U.S. Department of Labor

Office of Administrative Law Judges
John W. McCormack Post Office and Courthouse
Room 505
Boston, MA 02109

(617) 223-9355
(617) 223-4254 (FAX)

Issue date: 12Oct2001

CASE NOS.: 2000-LHC-0786, 2000-LHC-3418
OWCP NOS.: 6-147092, 6-173042

In the Matter Of:

KENNETH L. SKIDMORE
Claimant

v.

LOCKHEED MISSILE & SPACE COMPANY
Employer

and

WAUSAU INSURANCE CO.
ACE USA
Carriers

APPEARANCES:

John M. Schwartz, Esq.
For the Claimant

Kimberly A. Wilson, Esq.
For the Employer and Wausau

John M. Hess, Esq.
For the Employer and ACE USA

BEFORE: DAVID W. DI NARDI
District Chief Judge

DECISION AND ORDER - AWARDING BENEFITS

This is a claim for worker's compensation benefits under the Longshore and Harbor Workers' Compensation Act, as amended (33 U.S.C. §901, **et seq.**), herein referred to as the "Act." The hearing was held on March 8, 2001 in Orlando, Florida, at which time all parties were given the opportunity to present evidence and oral arguments. The following references will be used: TR for the official hearing transcript, ALJ EX for an exhibit offered by this Administrative Law Judge, CX for a Claimant's exhibit, DX for a Director's exhibit, JX for a Joint exhibit, EX for an exhibit offered by Wausau and RX for an exhibit offered by ACE USA. This decision is being rendered after having given full consideration to the entire record.

Stipulations and Issues

The parties stipulate, and I find:

1. The Act applies to these claims.

2. Claimant and the Employer were in an employee-employer relationship at the relevant times.

3. On July 6, 1992 and March 7, 1996, Claimant suffered injuries in the course and scope of his maritime employment.

4. Claimant gave the Employer notice of the injuries in a timely manner.

5. Claimant filed a timely claim for compensation and the Employer has not filed a notice of controversion.

6. The applicable average weekly wages are $823.32 and $835.60, respectively.

7. The Employer has paid certain medical benefits for the Claimant's injuries.

8. ACE USA has now agreed to reimburse to Claimant the amount of $100.00, the cost of an EMG that he underwent herein.

The unresolved issues in this proceeding are:

1. Whether Claimant's work-related injuries have resulted in a loss of wage-earning capacity.

2. If so, the nature and extent of such disability.

3. Entitlement to an award of medical benefits and interest on any past due compensation.

4. Entitlement to an attorney's fee and reimbursement of litigation expenses.

Post-hearing evidence has been admitted as:

Exhibit No.	**Item**	**Filing Date**
CX 20	Claimant's letter filing	03/15/01
CX 21	A listing of those days he was	03/15/01

	unable to work because of his medical problems or to visit a doctor for medical treatment	
CX 22	Claimant's letter suggesting a post-hearing briefing schedule	04/09/01
CX 23	Claimant's post-hearing Brief	05/08/01
RX 10	Brief filed on behalf of the Employer and ACE USA	05/09/01
EX 19	Brief filed on behalf of the Employer and Wausau Insurance	05/14/01
CX 24	Attorney Schwarz's letter suggesting a reply brief scheduling	05/16/01
RX 11	Attorney Hess's agreement to that the scheduling proposal	05/23/01
CX 25	Claimant's reply brief	06/01/01

The record was closed on June 1, 2001 as no further documents were filed.

Summary of the Evidence

Kenneth L. Skidmore ("Claimant" herein), thirty-nine (39) years of age, with a high school education, as well as four (4) years of additional training while serving as a machinist's mate in the U.S. Navy, and an employment history of manual labor in the Titusville, Florida area, including work as a machinist and expediter for McDonnell Douglas, began working as an expediter for Lockheed Space Company about ten (10) months or so before that tragic event involving the explosion of the **Challenger** space rocket. He survived three (3) layoffs and then went to work for Lockheed Missile and Space Company ("Employer"), a maritime facility adjacent to the navigable waters of the Atlantic Ocean. He was hired as a "storekeeper expediter and still works for that company, although now it is called "Lockheed-Martin" as a result of certain mergers and acquisitions in the space/defense industry." Claimant' current

job title is DASO Mechanic Senior.[1] (EX 17 at 3-11)

Claimant's lumbar problems began while he was working as a laborer/maintenance person for the Brevard County Road and Bridge Department; he injured his back while digging a ditch, underwent physical therapy for about one month and he "was released to do the work." (EX 17 at 11-12)

On July 6, 1992 Claimant was asked by his foreman, Leonard Zeh, to move two flotation collars, devices which are used to prevent a submarine from hitting the dock. Claimant and a co-worker, Andy Thompson, began to move the collar - a rectangular shaped device, twenty feet in height and twelve-to-fifteen feet in width, weighing approximately 65,000 pounds - about one thousand feet from one end of the dock to the other end because the crane tracks used to move the collar - and also called a camel - were all torn up. The dock is located at the so-called Trident Basin down at the Port and is on the Air Force Station. As Claimant began to pull on his end of the tether - and as he "bent over to pick the stuff up, that is when (he) started feeling everything," Claimant experiencing the onset of immediate pain in his lower back. He continued to work and he and Andy Thompson "went to pick up a hoist which was right there where we were working," **i.e.**, Poseidon East - named for that class of nuclear powered submarines. The back pain worsened and he told Mr. Thompson "that (his) back was bothering" him and they proceeded to drive to the missile assembly area to return the "stress-test slings and fixtures that we use." However, the ride to that area exacerbated his low back pain because "the roads were all tore up" and filled with potholes and when they "hit a hole," the back pain was so intense that he had to grab the roof of the vehicle in an attempt to obtain relief from the pain - which he described as a "sharp pain," just like being stuck by a needle. Claimant then asked "to see Roy Olson, (the Employer's) safety engineer, to report the accident" and Mr. Olson sent Claimant to the nearby dispensary at Cape Canaveral. (EX 17 at 11-20)

Claimant was given "some muscle relaxers" and he was placed on light duty for the rest of the day. However, the next day his "back was still hurting" and Mr. Olson sent Claimant to see Dr. Glenn P. Musselman, an orthopedic physician, and the doctor, diagnosing an acute sacral sprain (EX 1 at 1), prescribed anti-inflammatories and bed rest and told him to return for follow-up in two weeks. Unfortunately, on the day that Claimant went to the office to see Mr. Olson and to pick up the paperwork so that

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[1]DASO stands for Demonstration And Shutdown Operations for the Fleet Ballistics Program, according to Claimant. (EX 17 at 10, lines 7-9)

he could see Dr. Musselman, his vehicle was rear-ended by another vehicle causing his “head (to) hurt so bad,” and he returned to see the doctor three days later as he could not wait the full two weeks. Claimant told Dr. Musselman about that motor vehicle accident that occurred just outside the gate at the Air Force Station and that had caused headaches, a stiff neck and increased back pain. Dr. Musselman prescribed physical therapy at the Sunshine Clinic and Claimant testified that the therapy did provide some relief but the Employer would not allow Claimant to return to work unless he could perform all of his regular duties. He was out of work for about six (6) weeks or so and Wausau Insurance - the Carrier on the risk under the Longshore Act for the 1992 injury - paid him compensation and medical benefits for that absence. He returned to his regular work although his “lower back... was feeling sore, but (he) was still able to move around.” He has continued to experience low back pain to the current time and he has been told, as of his June 26, 1996 deposition, that he has “spinal stenosis, (and a) herniated disc.” (EX 17 at 20-31)

Dr. Rojas was treating Claimant at that time and he had told Claimant that if he performed surgery to “root out (his) spinal canal,” Claimant “would never do anything again.” (Ex 17 at 31)

On December 17, 1992 Claimant was assigned to do some sandblasting on the dock and Claimant, while wearing his full sandblasting suit, had to bend over and pick up all day sand bags weighing one hundred pounds. This work not only increased his back pain but caused “a shocking sensation going down (his) legs” by the end of the day. The symptoms were so intense that he had to go to the Emergency Room that night for treatment of that “shocking pain sensation.” He was given “a pain shot and (it) knocked (him) out, and the next day (he) went and seen a chiropractor,” Dr. Ostoski on Garden Street and, according to Claimant, “He (the doctor) did about the same things, therapy, and (the doctor) did the TENS unit and the shock treatment,” as well as the usual spinal manipulation. That therapy provided some relief at first but, after about five (5) months or so, the doctor decided that an MRI should be done because of the bilateral leg and lower back pain. The MRI took place in August of 1993 and it showed “bulging protrusions in the small spinal canal, spurring on every level,” Claimant remarking that he was also told that he had an extra vertebra disc as well. Dr. Ostroski referred Claimant to Joseph E. Rojas, M.D., for epidural injections in lieu of surgery. Claimant has had two series of three epidural injections and the first series provided “relief (for) about a month” and “the second ones didn’t take at all,” Claimant continuing to experience the low back and bilateral leg pain. (EX 17 at 31-46)

The symptoms persisted and Claimant finally had to stop

working on January 27, 1995 and he told his supervisor at the time that he could no longer work because he was in such pain and wanted to go see Dr. Rojas for evaluation. Claimant had had a myelogram in October of 1994 and he was told that also showed the same abnormalities as on his previous MRI. Dr. Rojas prescribed massage therapy and anti-inflammatories and he told Claimant that he would just have to learn to live with the pain because surgery would prevent him from returning to work. After six weeks or so Claimant was referred to Dr. Newman, a neurologist, and the doctor indicated that an EMG would be necessary to evaluate fully Claimant's problems. That test was finally performed a month later and showed that Claimant had "no nerve damage and everything looked okay." Dr. Rojas imposed restrictions on Claimant against lifting over 35 pounds, against squatting, climbing ladders and bending over and sitting more than 60 percent of the time, and the Employer then referred Claimant to Dr. Broom and Dr. Murphy, both of whom are orthopedic physicians, for further evaluation. Claimant brought that restriction form to Jeanette, the Human Resources Supervisor, and "she advised (Claimant) that (he) was through (working) as a mechanic." He remained out of work and Drs. Broom and Murphy evaluated Claimant together on September 8, 1995 and they "recommended the TENS belt... (that he) keep the jacuzzi and keep working out and doing things," and that he would just have to learn to live with the pain. (EX 17 at 46-56)

Claimant sees Dr. Rojas every three or four months in followup and for prescription refills and, as of his June 26, 1996 deposition, Claimant shows up for work but he was "working very little" because "they let me do what they want me to do" and "they don't want (him) doing anything that is going to hurt" him, Claimant remarking that whenever he has "to pick up something, (he) get(s) two guys to pick it up for" him. He is able to work forty (40) hours per week but occasionally has to turn down overtime because he needs that time to rest and because "most of it (**i.e.**, the overtime) is pretty physical." The Employer has accepted and abided by the restrictions of Dr. Murphy against picking up over thirty (30) pounds. While Dr. Murphy has imposed no restriction against climbing ladders or squatting, Claimant is very careful when he performs those activities. Claimant has been out of work a number of times because of his 1992 accident and Wausau has paid him compensation benefits for those absences. However, certain medical bills have not been paid, **i.e.**, they have not paid for the jacuzzi, or the EMG, prescriptions or for mileage in seeking medical treatment. Apparently Claimant's request to see a neurologist, Dr. Newman, was denied and Claimant then went to see Dr. Neuman, and also had the EMG.

According to Claimant, he has lost at least eight (8) months

of overtime between January 27, 1995 and September 10, 1995 while he was out of work and receiving compensation benefits from Wausau, an amount he estimated at about $15,000.00. Claimant also would like to have therapy more than the twice a week regimen authorized by Wausau at Spinal Rehab, because Dr. Rojas has prescribed therapy and massages more than that authorized by Wausau. (EX 17 at 56-77)

Claimant's work activities on March 7, 1996 are detailed in the manager's daily schedule log in evidence as RX 3.

The parties also deposed Claimant on May 25, 2000 (RX 9) and Claimant again testified about his specific duties with the Employer (RX 9 at 3-11), about his July 6, 1992 injury (RX 9 at 11-12) and treatment therefor (RX 9 at 12-16), about his return to work after his surgery and the job accommodations made by Glen Terry, his immediate supervisor (RX 9 at 16-17), and about his medical problems, including worsening depression since 1994 (RX 9 at 18-19).

According to Claimant, on March 7, 1996 he was working in the Trident Area at Port Canaveral (CX 15) on "a piece of equipment called standing mount" which is put "behind the submarine" and weighs about thirteen, fourteen thousand pounds." He spent several hours using a so-called needle scaler - a piece of equipment similar to a vibrating jack hammer - "twisting and turning in unusual ways to accomplish (his) job" of removing "excessive" rust from the metal surfaces of the base of the standing mount. He began to experience left arm pain "all the way up to (his) neck." He thought he was having a heart attack, stopped working immediately and reported that injury to Leonard Zeh, his "supervisor at the time," and he went to the nearby Emergency Room at Jess Parrish, and he was told to see his own doctor. He then went to see Dr. Rojas and the doctor treated the left arm and cervical problems by medication, anti-inflammatories and Prednisone. In 1997 Claimant had a laminectomy at the L3-L4-L5 levels and Dr. Wasserman, who treated Claimant's lumbar problems for the 1996 injury until he left that medical group, reported that Claimant's cervical spine MRI showed degenerative disc problems and bilateral carpal tunnel syndrome, worse on the left arm. Dr. Gerber has prescribed various medications for Claimant's lumbar and cervical pain symptoms. (RX 9 at 19-23)

Dr. Mark Gerber has told Claimant that the bilateral carpal tunnel was caused by his "work using excessive vibration tools," and he told his Employer what the doctor told him, Claimant remarking that he tries to avoid sandblasting work as much as possible because the use of vibratory tools aggravated his bilateral carpal tunnel syndrome and his cervical problems. Claimant believes his bilateral arm and neck problems were

caused by his 1996 injury. His back still hurts and he would like to see a neurosurgeon so that the nerves of his left leg in particular can be surgically corrected but Wausau will not authorize that surgery. He also wants to be able to see Dr. Gutman but neither Wausau nor ACE USA will authorize that counseling. He has missed some time from work after his return to work after his back surgery but neither Carrier will pay him for those days he is unable to work because of his multiple medical problems, including his back, leg, arm or neck problems. As Dr. Broom is "strictly a surgeon," he has referred Claimant to his office associate, Dr. Gerber, for followup because Dr. Gerber is a "pain management" specialist. (RX 9 at 23-31)

The parties deposed Claimant again on January 26, 2001 (EX 18) and Claimant testified that he is still employed by the Employer, but now as "a proof test mechanic/DASO lead," that he "manage(s) the proof test area, which consists of testing slings, cradles, forklifts, anything to put up missile ordnance," Claimant remarking that he has "to certify that it's capable of doing it" and that "DASO is the submarine work." In April of 2000 he began to work as the proof test mechanic and six (6) months later he became the DASO lead man over a crew of at least two workers but, "during DASO, it could be anywhere up to 14 people." He worked as a DASO mechanic up to April of 2000 and he currently earns "$23.40 something" as a lead man. He works at least 40 hours per week and some overtime "during the DASO operation." He wants to remain working for the Employer because he has "a good boss," Glen Terry, who takes care of Claimant and ensures that he has help to do the more physical aspects of his job. As of January 26, 2001, Dr. Broom had increased Claimant's restrictions to no repetitive bending over lifting over 40 pounds.

Dr. Gerber, a specialist in orthopedics/pain management, currently treats Claimant's lumbar problems primarily, although the doctor does examine Claimant's cervical problems resulting from his March 7, 1996 maritime injury at the Employer's facility, and "Wausau and Cigna (sic?)[2]" are paying those medical bills. Dr. Gerber began treating Claimant in January of 1999, at which time Dr. Wasserman left that medical group. Claimant sees Dr. Gerber every three or four months for prescription refills and for followup, Claimant remarking that last year the doctor administered three (3) epidural injections, that he "got very sick after the third one," "will never do another epidural," as he has "had nine of them" and will not "subject (himself) to that kind of pain again." His current medications include Lortab, Remeron - an anti-depressant to help him sleep -

[2]CIGNA Insurance Company has since been acquired by ACE USA.

and Celebrex, an anti-inflammatory. (EX 18 at 3-12, 26-27; EX 4)

Claimant would like to change from Dr. Gerber to another physician at the Florida Hospital, at Dr. Gerber's referral, for evaluation of the necessity and/or propriety of having "the nerve burned in (his) left leg, so (he would not) have to feel (his) leg hurt all the time." However, he was unable to have that evaluation because Wausau would not authorize that procedure. He daily experiences bilateral leg and lumbar pain and, just one week before his updated deposition, Dr. Gerber prescribed Prednisone, "a steroid/anti-inflammatory." Claimant's leg problems are exacerbated by "walking too much" as he "work(s) in an area that is kind of spread apart a little bit," resulting in "burning sensations." While Claimant likes Dr. Gerber, he wants to see a neurosurgeon so that the nerves in his legs can be fully evaluated. Claimant also needs psychotherapy but neither Carrier will authorize such counseling. He has seen Dr. Gutman once and would like to see the doctor again, once either Carrier approves such referral for Claimant's depression resulting from his multiple medical problems and his inability to work as he was able to do so prior to his July 6, 1992 back injury. Claimant has also been treated by a Dr. Salib for his urological problem in January of 2000, apparently occurring on those occasions "when (his) legs hurt real bad." Dr. Nichols has been Claimant's primary doctor for about one year and, prior to that, Dr. Corrila was his primary care physician. Dr. Gutman has recommended nutrition supplements for Claimant but apparently neither Wausau nor Cigna will authorize that prescription. Claimant has not yet taken those supplements. He has had to go to the Emergency Room several times for his back or cervical problems, has missed work on a few days "here and there" because of the pain or because of the medication that he has to take. (EX 18 at 12-24, 27-28)

Claimant's March 7, 1996 injury involved his left arm, left shoulder and cervical area (RX 1, RX 2) and "as long as (he) take(s) the Celebrex, it's pretty manageable. But, the shoulder blades and neck area just ache constantly." About eighteen (18) months ago his left eye "start(ed) twitching real bad," Claimant attributing that sensation to those times "when (his) arms hurt real bad," Claimant remarking, "then, when they put me on the Celebrex, the Celebrex seemed to help it."

Claimant was sent to see "Dr. Broom for a second opinion (on the need) for surgery" and Claimant agreed to the surgery recommended by Dr. Broom. (EX 25, 26, 18 at 29-30)

Michael J. Broom, M.D., P.A., a specialist in surgical and non-surgical spine care, has seen Claimant at least between September 6, 1995 and October 8, 1997 and the doctor's reports

are in evidence as CX 11 and EX 5.

Dr. Marc R. Gerber, an associate of Dr. Broom, has seen Claimant between March 10, 1999 and November 21, 2000 and the doctor's reports are in evidence as CX 12 and EX 8.

Dr. Justin Wasserman, also an associate of Dr. Broom, has seen Claimant between December 23, 1997 and January 6, 1999 and the doctor's reports are in evidence as CX 13 and EX 7.

Dr. E. Michael Gutman, a psychiatrist, evaluated Claimant at the request of Attorney Hess and his client and the doctor's thirteen (13) page report is in evidence as CX 14.

The records of Dr. Glenn P. Musselman, an orthopedic physician, relating to his treatment of the Claimant between July 8, 1992 and August 31, 1992 are in evidence as EX 1. The chiropractic treatment records of Gary R. Ostroski, D.C., between October 21, 1992 and September 15, 1993 are in evidence as EX 2. The records of Dr. Joseph E. Rojas for his treatment of the Claimant between August 16, 1993 and May 7, 1997 are in evidence as EX 3.

Dr. Richard P. Newman, a Board-Certified neurologist, examined Claimant on February 24, 1995 at the referral of Claimant's attorney and the doctor recommended, **inter alia**, a work hardening program and a psychological evaluation. (EX 6)

The parties deposed Priscilla A. Harry on January 26, 2001 and the transcript of her testimony is in evidence as CX 17. Ms. Harry, who has worked for the Employer since September of 1984 and who has served as a Human Resource Specialist since May of 1993, has duties of handling all personnel matters, such as hiring, interviewing and retiring. She also handles workers' compensation claims under the Longshore Act and is familiar with Claimant and with his July of 1992 and March of 1996 maritime injuries. With reference to the 1996 injury, Ms. Harry could not identify Claimant's free choice of physician as she did not discuss that choice with the Claimant, nor does she have any document signed by the Claimant exercising that initial choice. Ms. Harry also could not identify Claimant's authorized doctors but she did acknowledge that the Employer is responsible for medical bills relating to a work accident and that any such bill would be sent to the Carrier on the risk as of the date of injury. Ms. Harry reviewed Claimant's wage and personnel records since his May 5, 1986 hiring and those records did indicate those days and hours he did not work and took either sick leave or other leave to account for that absence. There is also an appropriate entry when the employee is absent due to a workers' compensation injury. (CX 7 at 4-22)

According to Ms. Harry, an employee out on sick leave would be paid for that absence "if he has sick time on the books. (Otherwise) They just don't - they don't pay them." (CX 17 at 19) There also were several entries reflecting that Claimant was on leave without pay status. (CX 17 at 23)

Ms. Harry had "no problem" with Claimant seeing Dr. Gutman or Dr. Shay or Dr. Bland and she did not know if Claimant had selected Dr. Gerber to treat his cervical problems resulting from his 1996 maritime injury. Wausau has a list of authorized physicians for its employees to see but all authorizations for such treatment are made by Wausau. (CX 17 at 23–27) Ms. Harry gave similar testimony at the hearing before me and her testimony is contained at pages 88-105 of the hearing transcript.

The parties deposed Wendy Maunu on February 12, 2001 and the transcript of her testimony is in evidence as CX 19. Ms. Maunu, who is Senior Claims Case Manager for Wausau Insurance Company, the other Carrier joined herein, and who has worked for Wausau for eighteen months or so, handles federal and state workers' compensation claims for Wausau and she is familiar with Claimant's July 9, 1992 maritime injury while working for the Employer, an injury for which Wausau was the Carrier on the risk under the Longshore Act. According to Ms. Maunu, the Employer and Wausau have accepted that injury as being compensable under the Longshore Act and have authorized Dr. Broom and Dr. Newman as the treating physicians for that injury, as well as Dr. Gerber, Dr. Ostoski, a chiropractor, Dr. Rojas, Dr. Helmy, Dr. Richard Meyer, Dr. Wasserman, Dr. Musselman and Dr. Travis. According to Ms. Maunu, "Dr. Newman was the (employee's) first choice in neurology... and that is the only one that (she was) aware of as officially being the employee's first choice." (CX 19 at 3-6)

Ms. Maunu is aware that Claimant had another injury at work in 1996 but she has no file for that injury because "Wausau no longer carries the policy for Lockheed." Ms. Maunu's "understanding is that the (Claimant's) current request is for a neurosurgeon and for a psychiatrist," "that the employee has Dr. Broom (as) his treating orthopedic and that Dr. Broom probably should make the recommendation to a neurosurgeon, since he has a neurologist already authorized." She has not "personally" contacted Dr. Broom and asked about the medical necessity for a referral to a neurosurgeon and with reference to a referral for a psychiatric evaluation, Wausau has not authorized such referral because "the treatment with the psychiatrist is not causally related to the 1992 date of accident," apparently because of the report of Dr. Gutman. Moreover, Ms. Maunu is aware that Claimant is alleging a loss of wage earning capacity but she is "not aware of the specific

request, just that there's a wage capacity issue," Ms. Maunu remarking that she has "through conversations with the Employer confirmed that he is working, has been working and it doesn't appear that he has any decrease in his earnings." She has not checked with her attorney to ascertain whether or not Claimant is entitled to receive compensation benefits for those hours or days he has not worked to undergo diagnostic tests or to see one of the doctors treating or evaluating him. (CX 19 at 7-13)

Ms. Maunu is not aware that Claimant has requested authorization for treatment by a pain management specialist but she is aware that he did see Dr. Gerber for pain management and that that doctor's bills have been paid. According to Ms. Maunu, Dr. Gerber is a pain management doctor but she was unable to testify that Claimant had exercised his first choice of physician in pain management but she was "pretty sure" that all of the physicians treating Claimant have been authorized. According to Ms. Maunu, Dr. Broom referred Claimant to Dr. Gerber and to Dr. Wasserman as well, the witness agreeing that Claimant did not pick either physician. However, Claimant did select Dr. Newman as his free choice of physician and the Carrier has denied Claimant's request for an evaluation by Dr. Seibert. As Dr. Wasserman left that medical practice, his associate Dr. Gerber took over Claimant's care and "Dr. Broom and Dr. Newman and Dr. Gerber" are Claimant's primary treating physicians at the current time. Ms. Maunu is not aware that Dr. Gerber has recommended a psychiatric evaluation even though she has read the doctor's reports because she "didn't see anything in the reports that (she has) received that indicate that" need for such referral. Claimant's hourly rate is higher at this time because he recently received a promotion to a lead mechanic. She had no idea if Claimant was working as much overtime as he did before his injuries. (CX 19 at 13-23)[3]

The parties deposed Brenda Meadows on January 25, 2001, the transcript of which is in evidence as CX 16. Ms. Meadows has been employed for over one year as a Workers' Compensation Specialist for ACE USA and for three years prior to that for ACE/CIGNA, and prior to that for CNA, in the same job capacity. Ms. Meadows, who handles the Longshore claims in her office, is familiar with Claimant and his two maritime injuries, for which there are two different Carriers under the Longshore Act. She has a file for the March 7, 1996 injury as that occurred while

[3]Objections made at the depositions of Ms. Meadows (CX 16), Ms. Harry (CX 17), Dr. Gutman (CX 18) and Ms. Maunu (CX 19) are overruled as the questions and answers are relevant and material to the unresolved issues herein and as the objections really go to the weight to be accorded to the opinions expressed in those answers.

ACE USA was the Carrier on the risk for the Employer, Lockheed Martin Missile and Space Company, the injury to Claimant's left arm occurring while Claimant was "using a needle scaler which is some type of an instrument that they use to scrape paint off the metal." According to Ms. Meadows, Claimant has also complained of neck pain as a result of that March 7, 1996 injury and ACE USA has accepted that injury as being compensable and has authorized Marc Gerber, M.D., as the treating physician, Ms. Meadows remarking that Dr. Michael Broom is also seeing Claimant but "more (for) the prior injury." ACE USA has paid the medical bills for that injury - a list totaling two pages. According to Ms. Meadows, Dr. Bruce Miller - who is in the medical practice with Dr. Gerber - has also been authorized as a treating physician for the Claimant. (CX 16 at 3-14)

Ms. Meadows is not aware that there is an outstanding claim for psychiatric care with Dr. Gutman as she "did not see one in (her) file," although she did have "a note here that says the Claimant was evaluated by a psychiatrist who indicated there were problems from the prior incident," and apparently that note is a letter from the attorney for ACE USA. Ms. Meadows also is not aware that Claimant was requesting medical care from Dr. Gutman but she would provide authorization for treatment by Dr. Gutman "(i)f it is related to my industrial accident," Ms. Meadows concluding, "According to Dr. Gutman's report, it would appear the need for psychiatric treatment is from his '92 accident and not my '96 accident." Ms. Meadows agreed that Claimant is in need of psychiatric treatment but because of the 1992 injury and she was not aware that Claimant has requested authorization to treat with Dr. Olson, a physiatrist, or with Dr. Bland, and that she would not be able to determine the necessity and propriety of those referrals without knowing, in her words, "what type of physicians they are and what we are talking about treatment for." (CX 16 at 14-18)

Ms. Meadows "can only assume that... Dr. Gerber and Dr. Bruce Miller" are Claimant's first choice of physician but she had no document or evidence indicating that Claimant had exercised his right to his initial first choice of physician. Ms. Meadows has been advised by the Employer that Claimant's work records have "indicated he is working and has not missed any time" but she has inquired to determine if Claimant has missed any work time for a doctor's visit or to undergo diagnostic tests. As of March 7, 1996 Claimant's hourly rate was $20.39 and his average weekly wage was $815.60 and with a corresponding compensation rate of $543.76. Ms. Meadows was informed of Claimant's March 7, 1996 injury by a telephone call from the Employer on April 8, 1999 (?). Ms. Meadows also had in her file a letter from Attorney Hess on October 13, 1999 indicating that Claimant was seeking a change in physician from Dr. Gerber to Dr. Shae or Dr. Olson, as well as a note of

October 18, 1999 from Howard Rothwell, a prior adjuster working on this file. Apparently that request has not been acted upon and is a request that Ms. Meadows "would investigate... and get back to" Claimant. (CX 16 at 18-25) Apparently there was an outstanding bill of $100.00 for an EMG at the Parrish Medical Center and ACE USA agreed at the hearing that that bill would be paid. (TR 33; CX 16 at 25-28)

Ms. Meadows is aware that Dr. Gutman has prescribed nutritional supplements for the Claimant but these have neither been authorized nor have the bills therefor been paid because Dr. Gutman has not been authorized by ACE USA to treat Claimant. (CX 16 at 29-33)

The parties deposed E. Michael Gutman, M.D., on February 12, 2001 and the transcript of the doctor's testimony is in evidence as CX 18. Dr. Gutman, who obtained his medical degree and licensure in 1960 is Board-Certified in General Psychiatry and Neurology, with additional qualifications in Forensic Psychiatry and also is a Diplomate of the American Board of Forensic Psychiatry. Dr. Gutman testified that he saw Claimant in his office on May 10, 1999, that he took a history report from the Claimant at that time and that the results of that examination are reflected in his May 25, 1999 report, a document in evidence as CX 14. Dr. Gutman's diagnostic opinion is as follows on page 11 thereof:

DIAGNOSTIC OPINION

AXIS I DSM-IV Clinical Disorder	(A)	Atypical Depressive Disorder with strong somatoform component - 311
AXIS II Personality Disorder	(A)	Passive-Aggressive, Emotionally Sensitive, Shy and Non-Psychologically Minded Personality Traits were noted.
AXIS III Physical Illness	(A)	Work-Related Low Back Injury, 7/6/92, with laminectomy, L3-4-5, 6/97, with ongoing pain complaints
	(B)	Status/Post Work-Related Neck Injury with MRI evidence of disc

		protrusion at C5-6-7 with complaints of pain radiating into left arm
	(C)	Muscle Contraction Headaches
AXIS IV Psychosocial Stressors	(A)	Severity: 3 - moderate Chronic pain; work stresses; change in activities.
AXIS V Global Assessment Functions GAF Scale: 0-100		GAF Current: 64 GAF Highest Past Year: estimated 64

Dr. Gutman, after reviewing Claimant's medical records, concluded as follows on pages 13-14 (Emphasis added):

> In my opinion the evaluee has developed an Atypical Depressive Disorder with a strong somotoform component, **causally related to his July 6, 1992 work-related injury**. It is my opinion that the **March 1996 work-related injury added a new dimension to his pain and misery**, but that he was already starting to buckle under the stress of continuing to function and work in pain. I recommend using a vigorous treatment approach, which I would be willing to provide if authorized by the Carrier, and would coordinate with Dr. Gerber, who is providing treatment of his neck and low back pain. I believe he would show improvement with this treatment approach. After a 10-12 week trial of treatment, I could then render a more definitive opinion concerning permanency and MMI. His prognosis to show a positive response to treatment is good. This is a man who has continued to work for seven years since his initial injury and three since the second injury in 1996. **This shows a positive work ethic and leads me to feel that prognosis is good. He is able to work with restrictions that include no activities which exceed his orthopedic limitations, and no exposure to excessive, non-customary work pressures, stresses, deadlines or quotas, not usually associated with his normal occupation or any other position found acceptable by his orthopedic surgeon.**

Dr. Gutman, who is Past President, The Florida Psychiatric Society, reiterated his opinions as to his diagnoses of Claimant's psychiatric condition as being causally related to Claimant's 1992 and 1996 maritime injuries and that he has prescribed for Claimant the usual five-prong treatment approach

- a treatment plan the doctor described at length at his deposition. According to Dr. Gutman, Claimant had not reached maximum medical improvement as of the date of that May 10, 1999 examination and that if authorized by the Carrier, Dr. Gutman would be willing to treat Claimant's psychiatric depressive disorder in accordance with the standard five-prong approach that would be designed to treat all of Claimant's psychiatric and orthopedic problems. (CX 18 at 3-14)

Dr. Gutman further testified that Claimant's psychiatric depressive disorder was caused by his 1992 maritime injury, that the 1996 maritime injury **aggravated that pre-existing condition and that his current disability is due to the cumulative effects of both injuries**. Dr. Gutman prescribed nutritional supplements for the Claimant to deal with his chronic pain and headaches as a reasonable medical necessity. (CX 18 at 15-19, 33-34) (Emphasis added)

Dr. Gutman agreed that Claimant's low back problems began after the 1992 accident, that the chronic pain had caused Claimant the most problem and that **his neck pain, initially caused by a 1992 motor vehicle accident, was aggravated by his 1996 maritime injury** and that such cervical pain had been "an annoying influence" since that time. Dr. Gutman also agreed that one of the stressors in this case is that Claimant has had problems over the years dealing with his Employer and the two Carriers joined herein and the vagaries of the workers' compensation system. (CX 18 at 19-25, 34) (Emphasis added)

Dr. Gutman also agreed that Dr. Gerber, as of March 10, 1999, had prescribed for Claimant referral to a psychiatrist for further evaluation and that Dr. Wasserman, as of April 23, 1998, had reported symptoms of clinical depression. (CX 18 at 25-32)

Claimant's pre-hearing brief (CX 20) summarizes the complexities of these claims and I shall insert a portion thereof at this point to put this matter in proper perspective as it clearly details the unresolved issues.

"1. Mr. Skidmore was injured in two accidents, one on July 6, 1992 and the second on March 7, 1996. The complexity of this case develops over the fact that while Mr. Skidmore has been and continues to be an employee of Lockheed Martin, and except for times of surgery or out of work due to his injury, has continually been an employee for Lockheed Martin. Both of Mr. Skidmore's injuries took place while under the jurisdiction of the Longshore & Harbor Workers' Compensation Act and for the same employer. The complexity is that between the two accidents there was a change in insurance carriers. Thus, there is a question not only as to the medical and indemnity benefits for which Mr. Skidmore is claiming entitlement but also as to which

Carrier is responsible for some of the issues.

"2. Mr. Skidmore, as stated, suffered two accidents and is claiming the need for psychiatric evaluation. At the behest of the second Carrier, Cigna Insurance, Mr. Skidmore underwent an evaluation by a board certified psychiatrist, Dr. Gutman. Dr. Gutman was of the opinion that the Claimant in fact did have depression and a need for psychiatric care but was somewhat unsure as to which accident caused the need for the psychiatric care. Thus, it is argued at this time by the Claimant that the need for psychiatric care has been proven. The question would be which Carrier is responsible for the payment of the psychiatric care.

"3. The Claimant has made a claim for reimbursement of $100.00 which he had to pay out of his pocket regarding an EMG. These bills have been submitted to the Carrier and there has been no payment on the $100.00.

"4. Regarding the 1992 accident, the Claimant, by way of informal conference, did select Dr. Richard Newman, a neurologist, as his first choice of physician. When it was determined that the Claimant needed surgery, while the Claimant never really made a formal selection of an orthopaedic surgeon, it is acknowledged that the Claimant did want to be treated and operated on by Dr. Boom, an orthopaedic surgeon, and it would only be fair for the Claimant to acknowledge that Dr. Broom was a choice of physician for orthopaedic care. When Dr. Broom completed his treatment he sent the Claimant over to a physiatrist, a Dr. Wasserman, for pain management. The Claimant while under the care of Dr. Wasserman, a physiatrist, made no objection to Dr. Wasserman's treatment, however, Dr. Wasserman has left the practice in the Orlando area and a Dr. Gerber took over the Claimant's treatment. The Claimant objects to and prefers not to be treated by Dr. Gerber and since the Claimant has never made a first choice of physician in the field of physiatry, makes a request for treatment with Dr. Olsson, a physiatrist in Brevard County which places Dr. Olsson in a proximity closer to the Claimant.

"As to the 1996 accident, the Employer/Carrier has never provided the Claimant with a first choice of physician. It should be noted that the Claimant in his first accident injured his lower back, and in the second accident injured the cervical area. It is true that the Claimant did receive some treatment from Dr. Gerber when treating his lower back, but this is a distinct and different injury and the Claimant is making a request for a Dr. Greenberg or a Dr. Bland as neurosurgeons to evaluate the Claimant.

"In addition thereto, the Claimant is making a demand for

a physiatrist for both pain management and physical restrictions. The Claimant at this time is willing to accept Dr. Olsson for the treatment of his cervical area, as well as for the lower back, thus the Employer is incurring no additional expenses in allowing the Claimant to see Dr. Olsson. This would provide the Claimant with his first choice of physiatrist in both cases without any further obligation on the part of the Employer/Carrier.

"5. In addition, the Claimant is making a claim for lost temporary total and temporary partial benefits. Over the time since his surgery the Claimant has lost work due to the need of going to a physicians office, being unable to work, or for physical therapy. It is believed that the Claimant should receive temporary partial benefits as a result of this lost time. It should be noted that the Claimant cannot make a claim for (permanent) lost earning or earning capacity since the Claimant has a claim for psychiatrist and the psychiatrist who has already evaluated the Claimant is of the opinion that the Claimant has not reached a point of maximum medical improvement.

"Finally, it should be stated that the Claimant has made claims for alternative physicians in order to help facilitate the selection. The Claimant wishes also, as an alternative to Dr. Olsson, to be treated by Dr. Shea, another physiatrist. Both of these physiatrists are located in Melbourne, Florida and, as already mentioned, would provide less travel for the Claimant. The reason for the claim for two doctors is because it may be that the two Carriers prefer to have different doctors or it may be easier for the Carriers to select one or the other doctor.

"Additionally, while it is true that the Claimant never selected Dr. Gutman for the psychiatric evaluation since this evaluation was performed at the request of the Carrier in the second case it may be that the Carrier in the first case feels uncomfortable with Dr. Gutman. On that basis the Claimant is willing to select as his first choice of psychiatrist Dr. Newberry, a board certified psychiatrist located in Melbourne, Florida, and again this would provide the Claimant with less travel time in arranging for his medical treatment," according to Claimant's pre-hearing brief. (CX 20)

On the basis of the totality of this record and having observed the demeanor and heard the testimony of credible witnesses, I make the following:

Findings of Fact and Conclusions of Law

This Administrative Law Judge, in arriving at a decision in this matter, is entitled to determine the credibility of the

witnesses, to weigh the evidence and draw his own inferences from it, and he is not bound to accept the opinion or theory of any particular medical examiner. **Banks v. Chicago Grain Trimmers Association, Inc.**, 390 U.S. 459 (1968), **reh. denied**, 391 U.S. 929 (1969); **Todd Shipyards v. Donovan**, 300 F.2d 741 (5th Cir. 1962); **Scott v. Tug Mate, Incorporated**, 22 BRBS 164, 165, 167 (1989); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Anderson v. Todd Shipyard Corp.**, 22 BRBS 20, 22 (1989); **Hughes v. Bethlehem Steel Corp.**, 17 BRBS 153 (1985); **Seaman v. Jacksonville Shipyard, Inc.**, 14 BRBS 148.9 (1981); **Brandt v. Avondale Shipyards, Inc.**, 8 BRBS 698 (1978); **Sargent v. Matson Terminal, Inc.**, 8 BRBS 564 (1978).

The Act provides a presumption that a claim comes within its provisions. **See** 33 U.S.C. §920(a). This Section 20 presumption "applies as much to the nexus between an employee's malady and his employment activities as it does to any other aspect of a claim." **Swinton v. J. Frank Kelly, Inc.**, 554 F.2d 1075 (D.C. Cir. 1976), **cert. denied**, 429 U.S. 820 (1976). Claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. **Golden v. Eller & Co.**, 8 BRBS 846 (1978), **aff'd**, 620 F.2d 71 (5th Cir. 1980); **Hampton v. Bethlehem Steel Corp.**, 24 BRBS 141 (1990); **Anderson v. Todd Shipyards**, **supra**, at 21; **Miranda v. Excavation Construction, Inc.**, 13 BRBS 882 (1981).

However, this statutory presumption does not dispense with the requirement that a claim of injury must be made in the first instance, nor is it a substitute for the testimony necessary to establish a "**prima facie**" case. The Supreme Court has held that "[a] **prima facie** 'claim for compensation,' to which the statutory presumption refers, must at least allege an injury that arose in the course of employment as well as out of employment." **United States Indus./Fed. Sheet Metal, Inc., v. Director, Office of Workers' Compensation Programs, U.S. Dep't of Labor**, 455 U.S. 608, 615 102 S. Ct. 1318, 14 BRBS 631, 633 (CRT) (1982), **rev'g Riley v. U.S. Indus./Fed. Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). Moreover, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers' Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1318 (1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). The presumption, though, is applicable once claimant establishes that he has sustained an injury, **i.e.**, harm to his body. **Preziosi v. Controlled Industries**, 22 BRBS 468, 470 (1989); **Brown v. Pacific Dry Dock Industries**, 22 BRBS 284, 285 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS

56, 59 (1985); **Kelaita v. Triple A. Machine Shop**, 13 BRBS 326 (1981).

To establish a **prima facie** claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that (1) the claimant sustained physical harm or pain and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused the harm or pain. **Kelaita**, **supra**; **Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). Once this **prima facie** case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. To rebut the presumption, the party opposing entitlement must present substantial evidence proving the absence of or severing the connection between such harm and employment or working conditions. **Kier**, **supra**; **Parsons Corp. of California v. Director, OWCP**, 619 F.2d 38 (9th Cir. 1980); **Butler v. District Parking Management Co.**, 363 F.2d 682 (D.C. Cir. 1966); **Ranks v. Bath Iron Works Corp.**, 22 BRBS 301, 305 (1989). Once claimant establishes a physical harm and working conditions which could have caused or aggravated the harm or pain the burden shifts to the employer to establish that claimant's condition was not caused or aggravated by his employment. **Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. **Del Vecchio v. Bowers**, 296 U.S. 280 (1935); **Volpe v. Northeast Marine Terminals**, 671 F.2d 697 (2d Cir. 1981). In such cases, I must weigh all of the evidence relevant to the causation issue. **Sprague v. Director, OWCP**, 688 F.2d 862 (1st Cir. 1982); **MacDonald v. Trailer Marine Transport Corp.**, 18 BRBS 259 (1986).

The U.S. Court of Appeals for the First Circuit has considered the Employer’s burden of proof in rebutting a **prima facie** claim under Section 20(a) and that Court has issued a most significant decision in **Bath Iron Works Corp. v. Director, OWCP (Shorette)**, 109 F.3d 53, 31 BRBS 19(CRT)(1st Cir. 1997).

In **Shorette**, the United States Court of Appeals for the First Circuit held that an employer need not rule out any possible causal relationship between a claimant’s employment and his condition in order to establish rebuttal of the Section 20(a) presumption. The court held that employer need only produce substantial evidence that the condition was not caused or aggravated by the employment. **Id.**, 109 F.3d at 56,31 BRBS at 21 (CRT); **see also Bath Iron Works Corp. v. Director, OWCP [Hartford]**, 137 F.3d 673, 32 BRBS 45 (CRT)(1st Cir. 1998). The court held that requiring an employer to rule out any possible

connection between the injury and the employment goes beyond the statutory language presuming the compensability of the claim "in the absence of substantial evidence to the contrary." 33 U.S.C. §920(a). **See Shorette,** 109 F.3d at 56, 31 BRBS at 21 (CRT). The "ruling out" standard was recently addressed and rejected by the Court of Appeals for the Fifth and Seventh Circuits as well. **Conoco, Inc. v. Director, OWCP [Prewitt]**, 194 F.3d 684, 33 BRBS 187(CRT)(5th Cir. 1999); **American Grain Trimmers, Inc. v. OWCP**, 181 F.3d 810, 33 BRBS 71(CRT)(7th Cir. 1999); **see also O'Kelley v. Dep't of the Army/NAF**, 34 BRBS 39 (2000); **but see Brown v. Jacksonville Shipyards, Inc.**, 893 F.2d 294, 23 BRBS 22 (CRT)(11th Cir. 1990) (affirming the finding that the Section 20(a) presumption was not rebutted because no physician expressed an opinion "ruling out the possibility" of a causal relationship between the injury and the work).

To establish a **prima facie** case for invocation of the Section 20(a) presumption, claimant must prove that (1) he suffered a harm, and (2) an accident occurred or working conditions existed which could have caused the harm. **See**, **e.g.**, **Noble Drilling Company v. Drake**, 795 F.2d 478, 19 BRBS 6 (CRT) (5th Cir. 1986); **James v. Pate Stevedoring Co.**, 22 BRBS 271 (1989). If claimant's employment aggravates a non-work-related, underlying disease so as to produce incapacitating symptoms, the resulting disability is compensable. **See Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986); **Gardner v. Bath Iron Works Corp.**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385, 13 BRBS 101 (1st Cir. 1981). If employer presents substantial evidence sufficient to sever the connection between claimant's harm and his employment, the presumption no longer controls, and the issue of causation must be resolved on the whole body of proof. **See**, **e.g.**, **Leone v. Sealand Terminal Corp.**, 19 BRBS 100 (1986).

The Board has held that credible complaints of subjective symptoms and pain can be sufficient to establish the element of physical harm necessary for a **prima facie** case for Section 20(a) invocation. **See Sylvester v. Bethlehem Steel Corp.**, 14 BRBS 234, 236 (1981), **aff'd**, 681 F.2d 359, 14 BRBS 984 (5th Cir. 1982). Moreover, I may properly rely on Claimant's statements to establish that he experienced a work-related harm, and as it is undisputed that a work accident occurred which could have caused the harm, the Section 20(a) presumption is invoked in this case. **See**, **e.g.**, **Sinclair v. United Food and Commercial Workers**, 23 BRBS 148, 151 (1989). Moreover, Employer's general contention that the clear weight of the record evidence establishes rebuttal of the pre-presumption is not sufficient to rebut the presumption. **See generally Miffleton v. Briggs Ice Cream Co.**, 12 BRBS 445 (1980).

The presumption of causation can be rebutted only by "substantial evidence to the contrary" offered by the employer. 33 U.S.C. § 920. What this requirement means is that the employer must offer evidence which severs the connection between the alleged event and the alleged harm. In **Caudill v. Sea Tac Alaska Shipbuilding**, 25 BRBS 92 (1991), the carrier offered a medical expert who testified that an employment injury did not "play a significant role" in contributing to the back trouble at issue in this case. The Board held such evidence insufficient as a matter of law to rebut the presumption because the testimony did not negate the role of the employment injury in contributing to the back injury. **See also Cairns v. Matson Terminals, Inc.**, 21 BRBS 299 (1988) (medical expert opinion which did entirely attribute the employee's condition to non-work-related factors was nonetheless insufficient to rebut the presumption where the expert equivocated somewhat on causation elsewhere in his testimony). Where the employer/carrier can offer testimony which completely severs the causal link, the presumption is rebutted. **See Phillips v. Newport News Shipbuilding & Dry Dock Co.**, 22 BRBS 94 (1988) (medical testimony that claimant's pulmonary problems are consistent with cigarette smoking rather than asbestos exposure sufficient to rebut the presumption).

For the most part only medical testimony can rebut the Section 20(a) presumption. **But see Brown v. Pacific Dry Dock**, 22 BRBS 284 (1989) (holding that asbestosis causation was not established where the employer demonstrated that 99% of its asbestos was removed prior to the claimant's employment while the remaining 1% was in an area far removed from the claimant and removed shortly after his employment began). Factual issues come in to play only in the employee's establishment of the **prima facie** elements of harm/possible causation and in the later factual determination once the Section 20(a) presumption passes out of the case.

Once rebutted, the presumption itself passes completely out of the case and the issue of causation is determined by examining the record "as a whole". **Holmes v. Universal Maritime Services Corp.**, 29 BRBS 18 (1995). Prior to 1994, the "true doubt" rule governed the resolution of all evidentiary disputes under the Act; where the evidence was in equipoise, all factual determinations were resolved in favor of the injured employee. **Young & Co. v. Shea**, 397 F.2d 185, 188 (5th Cir. 1968), **cert. denied**, 395 U.S. 920, 89 S. Ct. 1771 (1969). The Supreme Court held in 1994 that the "true doubt" rule violated the Administrative Procedure Act, the general statute governing all administrative bodies. **Director, OWCP v. Greenwich Collieries**, 512 U.S. 267, 114 S. Ct. 2251, 28 BRBS 43 (CRT) (1994). Accordingly, after **Greenwich Collieries** the employee

bears the burden of proving causation by a preponderance of the evidence after the presumption is rebutted.

As the Respondents dispute that the Section 20(a) presumption is invoked, **see Kelaita v. Triple A Machine Shop**, 13 BRBS 326 (1981), the burden shifts to employer to rebut the presumption with substantial evidence which establishes that claimant's employment did not cause, contribute to, or aggravate his condition. **See Peterson v. General Dynamics Corp**., 25 BRBS 71 (1991), **aff'd sub nom. Insurance Company of North America v. U.S. Dept. of Labor**, 969 F.2d 1400, 26 BRBS 14 (CRT)(2d Cir. 1992), **cert. denied,** 507 U.S. 909, 113 S. Ct. 1264 (1993); **Obert v. John T. Clark and Son of Maryland,** 23 BRBS 157 (1990); **Sam v. Loffland Brothers Co.**, 19 BRBS 228 (1987). The unequivocal testimony of a physician that no relationship exists between an injury and a claimant's employment is sufficient to rebut the presumption. **See Kier v. Bethlehem Steel Corp.**, 16 BRBS 128 (1984). If an employer submits substantial countervailing evidence to sever the connection between the injury and the employment, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. **Stevens v. Tacoma Boatbuilding Co.**, 23 BRBS 191 (1990). This Administrative Law Judge, in weighing and evaluating all of the record evidence, may place greater weight on the opinions of the employee's treating physician as opposed to the opinion of an examining or consulting physician. In this regard, **see Pietrunti v. Director, OWCP**, 119 F.3d 1035, 31 BRBS 84 (CRT)(2d Cir. 1997). **See also Amos v. Director, OWCP,** 153 F.3d 1051 (9th Cir. 1998), **amended,** 164 F.3d 480, 32 BRBS 144 (CRT) (9th Cir. 1999).

In the case **sub judice**, Claimant alleges that the harm to his bodily frame, **i.e.**, his low back, bilateral arm and cervical problems, resulted from working conditions at the Employer's maritime facility. The Respondents have introduced no evidence severing the connection between such harm and Claimant's maritime employment. Thus, Claimant has established a **prima facie** claim that such harm is a work-related injury, as shall now be discussed.

Injury

The term "injury" means accidental injury or death arising out of and in the course of employment, and such occupational disease or infection as arises naturally out of such employment or as naturally or unavoidably results from such accidental injury. **See** 33 U.S.C. §902(2); **U.S. Industries/Federal Sheet Metal, Inc., et al., v. Director, Office of Workers Compensation Programs, U.S. Department of Labor**, 455 U.S. 608, 102 S.Ct. 1312

(1982), **rev'g Riley v. U.S. Industries/Federal Sheet Metal, Inc.**, 627 F.2d 455 (D.C. Cir. 1980). A work-related aggravation of a pre-existing condition is an injury pursuant to Section 2(2) of the Act. **Gardner v. Bath Iron Works Corporation**, 11 BRBS 556 (1979), **aff'd sub nom. Gardner v. Director, OWCP**, 640 F.2d 1385 (1st Cir. 1981); **Preziosi v. Controlled Industries**, 22 BRBS 468 (1989); **Januszie wicz v. Sun Shipbuilding and Dry Dock Company**, 22 BRBS 376 (1989) (**Decision and Order on Remand**); **Johnson v. Ingalls Shipbuilding**, 22 BRBS 160 (1989); **Madrid v. Coast Marine Construction**, 22 BRBS 148 (1989). Moreover, the employment-related injury need not be the sole cause, or primary factor, in a disability for compensation purposes. Rather, if an employment-related injury contributes to, combines with or aggravates a pre-existing disease or underlying condition, the entire resultant disability is compensable. **Strachan Shipping v. Nash**, 782 F.2d 513 (5th Cir. 1986); **Independent Stevedore Co. v. O'Leary**, 357 F.2d 812 (9th Cir. 1966); **Kooley v. Marine Industries Northwest**, 22 BRBS 142 (1989); **Mijangos v. Avondale Shipyards, Inc.**, 19 BRBS 15 (1986); **Rajotte v. General Dynamics Corp.**, 18 BRBS 85 (1986). Also, when claimant sustains an injury at work which is followed by the occurrence of a subsequent injury or aggravation outside work, employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. **Bludworth Shipyard, Inc. v. Lira**, 700 F.2d 1046 (5th Cir. 1983); **Mijangos**, **supra**; **Hicks v. Pacific Marine & Supply Co.**, 14 BRBS 549 (1981). The term injury includes the aggravation of a pre-existing non-work-related condition or the combination of work- and non-work-related conditions. **Lopez v. Southern Stevedores**, 23 BRBS 295 (1990); **Care v. WMATA**, 21 BRBS 248 (1988).

This closed record conclusively establishes, and I so find and conclude, that Claimant sustained injuries on July 6, 1992 and March 7, 1996 in the course of his maritime employment, that the 1992 injury involved his low back, that the 1996 injury involved his left arm, cervical and shoulder areas, that the Employer had timely notice of both injuries, that the respective Carriers have paid certain compensation benefits and authorized certain medical care and treatment for the Claimant, that apparently no Form LS 207 has been filed herein and that Claimant timely filed for benefits once a dispute arose between the parties. This Administrative Law Judge, in so concluding, accepts and gives greater weight to the evidence submitted by the Claimant, as well as the testimony of Ms. Harry as to the Employer’s actual knowledge of Claimant’s multiple medical problems. Thus, the only remaining issues are the nature and extent of his disability, the responsible Employer and Claimant’s entitlement to the medical treatment that he requests.

Nature and Extent of Disability

It is axiomatic that disability under the Act is an economic concept based upon a medical foundation. **Quick v. Martin**, 397 F.2d 644 (D.C. Cir. 1968); **Owens v. Traynor**, 274 F. Supp. 770 (D.Md. 1967), **aff'd**, 396 F.2d 783 (4th Cir. 1968), **cert. denied**, 393 U.S. 962 (1968). Thus, the extent of disability cannot be measured by physical or medical condition alone. **Nardella v. Campbell Machine, Inc.**, 525 F.2d 46 (9th Cir. 1975). Consideration must be given to claimant's age, education, industrial history and the availability of work he can perform after the injury. **American Mutual Insurance Company of Boston v. Jones**, 426 F.2d 1263 (D.C. Cir. 1970). Even a relatively minor injury may lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified. (**Id**. at 1266)

Claimant has the burden of proving the nature and extent of his disability without the benefit of the Section 20 presumption. **Carroll v. Hanover Bridge Marina**, 17 BRBS 176 (1985); **Hunigman v. Sun Shipbuilding & Dry Dock Co.**, 8 BRBS 141 (1978). However, once claimant has established that he is unable to return to his former employment because of a work-related injury or occupational disease, the burden shifts to the employer to demonstrate the availability of suitable alternative employment or realistic job opportunities which claimant is capable of performing and which he could secure if he diligently tried. **New Orleans (Gulfwide) Stevedores v. Turner**, 661 F.2d 1031 (5th Cir. 1981); **Air America v. Director**, 597 F.2d 773 (1st Cir. 1979); **American Stevedores, Inc. v. Salzano**, 538 F.2d 933 (2d Cir. 1976); **Preziosi v. Controlled Industries**, 22 BRBS 468, 471 (1989); **Elliott v. C & P Telephone Co.**, 16 BRBS 89 (1984). While Claimant generally need not show that he has tried to obtain employment, **Shell v. Teledyne Movible Offshore, Inc.**, 14 BRBS 585 (1981), he bears the burden of demonstrating his willingness to work, **Trans-State Dredging v. Benefits Review Board**, 731 F.2d 199 (4th Cir. 1984), once suitable alternative employment is shown. **Wilson v. Dravo Corporation**, 22 BRBS 463, 466 (1989); **Royce v. Elrich Construction Company**, 17 BRBS 156 (1985).

Claimant's injury has not become permanent as he requires additional medical care and treatment and as his recovery has been significantly delayed by the failure of ACE USA to authorize and approve that medical regimen recommended by Claimant’s doctors, as further discussed below. A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period.

General Dynamics Corporation v. Benefits Review Board, 565 F.2d 208 (2d Cir. 1977); **Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**, 394 U.S. 976 (1969); **Seidel v. General Dynamics Corp.**, 22 BRBS 403, 407 (1989); **Stevens v. Lockheed Shipbuilding Co.**, 22 BRBS 155, 157 (1989); **Trask v. Lockheed Shipbuilding and Construction Company**, 17 BRBS 56 (1985); **Mason v. Bender Welding & Machine Co.**, 16 BRBS 307, 309 (1984). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of "maximum medical improvement." The determination of when maximum medical improvement is reached so that claimant's disability may be said to be permanent is primarily a question of fact based on medical evidence. **Lozada v. Director, OWCP**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Hite v. Dresser Guiberson Pumping**, 22 BRBS 87, 91 (1989); **Care v. Washington Metropolitan Area Transit Authority**, 21 BRBS 248 (1988); **Wayland v. Moore Dry Dock**, 21 BRBS 177 (1988); **Eckley v. Fibrex and Shipping Company**, 21 BRBS 120 (1988); **Williams v. General Dynamics Corp.**, 10 BRBS 915 (1979).

The Benefits Review Board has held that a determination that claimant's disability is temporary or permanent may not be based on a prognosis that claimant's condition may improve and become stationary at some future time. **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979). The Board has also held that a disability need not be "eternal or everlasting" to be permanent and the possibility of a favorable change does not foreclose a finding of permanent disability. **Exxon Corporation v. White**, 617 F.2d 292 (5th Cir. 1980), **aff'g** 9 BRBS 138 (1978). Such future changes may be considered in a Section 22 modification proceeding when and if they occur. **Fleetwood v. Newport News Shipbuilding and Dry Dock Company**, 16 BRBS 282 (1984), **aff'd**, 776 F.2d 1225, 18 BRBS 12 (CRT) (4th Cir. 1985).

Permanent disability has been found where little hope exists of eventual recovery, **Air America, Inc. v. Director, OWCP**, 597 F.2d 773 (1st Cir. 1979), where claimant has already undergone a large number of treatments over a long period of time, **Meecke v. I.S.O. Personnel Support Department**, 10 BRBS 670 (1979), even though there is the possibility of favorable change from recommended surgery, and where work within claimant's work restrictions is not available, **Bell v. Volpe/Head Construction Co.**, 11 BRBS 377 (1979), and on the basis of claimant's credible complaints of pain alone. **Eller and Co. v. Golden**, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced, **Ballard v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 676 (1978); **Ruiz v. Universal Maritime Service Corp.**, 8 BRBS 451 (1978), or that claimant be bedridden to be totally disabled, **Watson v. Gulf**

Stevedore Corp., 400 F.2d 649 (5th Cir. 1968). Moreover, the burden of proof in a temporary total case is the same as in a permanent total case. **Bell**, **supra**. **See also Walker v. AAF Exchange Service**, 5 BRBS 500 (1977); **Swan v. George Hyman Construction Corp.**, 3 BRBS 490 (1976). There is no requirement that claimant undergo vocational rehabilitation testing prior to a finding of permanent total disability, **Mendez v. Bernuth Marine Shipping, Inc.**, 11 BRBS 21 (1979); **Perry v. Stan Flowers Company**, 8 BRBS 533 (1978), and an award of permanent total disability may be modified based on a change of condition. **Watson v. Gulf Stevedore Corp.**, **supra**.

An employee is considered permanently disabled if he has any residual disability after reaching maximum medical improvement. **Lozada v. General Dynamics Corp.**, 903 F.2d 168, 23 BRBS 78 (CRT) (2d Cir. 1990); **Sinclair v. United Food & Commercial Workers**, 13 BRBS 148 (1989); **Trask v. Lockheed Shipbuilding & Construction Co.**, 17 BRBS 56 (1985). A condition is permanent if claimant is no longer undergoing treatment with a view towards improving his condition, **Leech v. Service Engineering Co.**, 15 BRBS 18 (1982), or if his condition has stabilized. **Lusby v. Washington Metropolitan Area Transit Authority**, 13 BRBS 446 (1981).

A disability is considered permanent as of the date claimant's condition reaches maximum medical improvement or if the condition has continued for a lengthy period and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. **See Watson v. Gulf Stevedore Corp.**, 400 F.2d 649 (5th Cir. 1968), **cert. denied**. 394 U.S. 976 (1969). If a physician believes that further treatment should be undertaken, then a possibility of improvement exists, and even if, in retrospect, the treatment was unsuccessful, maximum medical improvement does not occur until the treatment is complete. **Louisiana Ins. Guaranty Assn. v. Abbott,** 40 F.3d 122, 29 BRBS 22(CRT)(5th Cir. 1994); **Leech v. Service Engineering Co.,** 15 BRBS 18 (1982). If surgery is anticipated, maximum medical improvement has not been reached. **Kuhn v. Associated press**, 16 BRBS 46 (1983). If surgery is not anticipated, or if the prognosis after surgery is uncertain, the claimant's condition may be permanent. **Worthington v. Newport News Shipbuilding & Dry Dock Co.**, 18 BRBS 200 (1986); **White v. Exxon Corp.,** 9 BRBS 138 (1978), **aff'd mem**., 617 F.2d 292 (5th Cir. 1982).

Sections 8(a) and (b) and Total Disability

A worker entitled to permanent partial disability for an injury arising under the schedule may be entitled to greater compensation under Sections 8(a) and (b) by a showing that

he/she is totally disabled. **Potomac Electric Power Co. v. Director**, 449 U.S. 268 (1980) (herein "Pepco"). **Pepco**, 449 U.S. at 277; **Davenport v. Daytona Marine and Boat Works**, 16 BRBS 1969, 199 (1984). However, unless the worker is totally disabled, he is limited to the compensation provided by the appropriate schedule provision. **Winston v. Ingalls Shipbuilding, Inc.**, 16 BRBS 168, 172 (1984).

Two separate scheduled disabilities must be compensated under the schedules in the absence of a showing of a total disability, and Claimant is precluded from (1) establishing a greater loss of wage-earning capacity than the presumed by the Act or (2) receiving compensation benefits under Section 8(c)(21). Since Claimant suffered injuries to more than one member covered by the schedule, he must be compensated under the applicable portion of Section 8(c)(1) - (20), with the awards running consecutively. **Potomac Electric Power Co. v. Director, OWCP**, 449 U.S. 268 (1980). In **Brandt v. Avondale Shipyards, Inc.**, 16 BRBS 120 (1984), the Board held that Claimant was entitled to two separate awards under the schedule for his work-related injuries to his right knee and left index finger.

In this proceeding, the Claimant has sought, both before the District Director and before this Court, benefits for alleged partial disability for certain periods of time to date and continuing. Moreover, the issue of permanency has not yet been considered by the District Director. (ALJ EX 1, ALJ EX 13, ALJ EX 26) In this regard, **see Seals v. Ingalls Shipbuilding, Division of Litton Systems, Inc.**, 8 BRBS 182 (1978).

With reference to Claimant's residual work capacity, an employer can establish suitable alternate employment by offering an injured employee a light duty job which is tailored to the employee's physical limitations, so long as the job is necessary and claimant is capable of performing such work. **Walker v. Sun Shipbuilding and Dry Dock Co.**, 19 BRBS 171 (1986); **Darden v. Newport News Shipbuilding and Dry Dock Co.**, 18 BRBS 224 (1986). Claimant must cooperate with the employer's re-employment efforts and if employer establishes the availability of suitable alternate job opportunities, the Administrative Law Judge must consider claimant's willingness to work. **Trans-State Dredging v. Benefits Review Board, U.S. Department of Labor and Tarner**, 731 F.2d 199 (4th Cir. 1984); **Roger's Terminal & Shipping Corp. v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986). An employee is not entitled to total disability benefits merely because he does not like or desire the alternate job. **Villasenor v. Marine Maintenance Industries, Inc.**, 17 BRBS 99, 102 (1985), **Decision and Order on Reconsideration**, 17 BRBS 160 (1985).

An award for permanent partial disability in a claim not covered by the schedule is based on the difference between claimant's pre-injury average weekly wage and his post-injury wage-earning capacity. 33 U.S.C. §908(c)(21)(h); **Richardson v. General Dynamics Corp.**, 23 BRBS (1990); **Cook v. Seattle Stevedoring Co.**, 21 BRBS 4, 6 (1988). If a claimant cannot return to his usual employment as a result of his injury but secures other employment, the wages which the new job would have paid at the time of claimant's injury are compared to the wages claimant was actually earning pre-injury to determine if claimant has suffered a loss of wage-earning capacity. **Cook**, **supra**. Subsections 8(c)(21) and 8(h) require that wages earned post-injury be adjusted to the wage levels which the job paid at time of injury. **See Walker v. Washington Metropolitan Area Transit Authority**, 793 F.2d 319, 18 BRBS 100 (CRT) (D.C. Cir. 1986); **Bethard v. Sun Shipbuilding & Dry Dock Co.**, 12 BRBS 691, 695 (1980).

It is now well-settled that the proper comparison for determining a loss of wage-earning capacity is between the wages claimant received in his usual employment pre-injury and the wages claimant's post-injury job paid **at the time of his injury**. **Richardson**, **supra**; **Cook**, **supra**.

The parties herein now have the benefit of a most significant opinion rendered by the First Circuit Court of Appeals in affirming a matter over which this Administrative Law Judge presided. In **White v. Bath Iron Works Corp.**, 812 F.2d 33 (1st Cir. 1987), Senior Circuit Court Judge Bailey Aldrich framed the issue as follows: "the question is how much claimant should be reimbursed for this loss (of wage-earning capacity), it being common ground that it should be a fixed amount, not to vary from month to month to follow current discrepancies." **White**, **supra**, at 34.

Senior Circuit Judge Aldrich rejected outright the employer's argument that the Administrative Law Judge "must compare an employee's post-injury actual earnings to the average weekly wage of the employee's time of injury" as that thesis is not sanctioned by Section 8(h).

Thus, it is the law that the post-injury wages must first be adjusted for inflation and then compared to the employee's average weekly wage at the time of his injury. That is exactly what Section 8(h) provides in its literal language.

Claimant maintains that his post-injury wages are representative of his wage-earning capacity, that he has learned how to live with and cope with his weakened back, cervical and bilateral arm conditions and that his Employer has allowed him to compensate for his medical limitations. I agree as it is

rather apparent to this Administrative Law Judge that Claimant is a highly-motivated individual who receives satisfaction in being gainfully employed.

The law in this area is very clear and if an employee is offered a job at his pre-injury wages as part of his employer's rehabilitation program, this Administrative Law Judge can find that there is no lost wage-earning capacity and that the employee therefore is not disabled. **Swain v. Bath Iron Works Corporation**, 17 BRBS 145, 147 (1985); **Darcell v. FMC Corporation, Marine and Rail Equipment Division**, 14 BRBS 294, 197 (1981). However, I am also cognizant of case law which holds that the employer need not rehire the employee, **New Orleans (Gulfwide) Stevedores, Inc. v. Turner**, 661 F.2d 1031, 1043 (5th Cir. 1981), and that the employer is not required to act as an employment agency. **Royce v. Elrich Construction Co.**, 17 BRBS 157 (1985).

Claimant submits that the record establishes his entitlement to benefits for temporary total/temporary partial benefits as a result of being out of work intermittently due to his industrial accidents. It should be noted that a claim which may be appropriate for loss of earning and earning capacity, which may be normally raised in the situation of loss of intermittent earnings cannot be raised in view of the fact that the Claimant's takes the position that he has not reached maximum medical improvement due to Dr. Gutman's testimony and for this reason the only benefits available to the Claimant are temporary total/temporary partial benefits.

On Page 32 of the transcript, it was the Claimant's contention that for the 1992 accident, his average weekly wage was $743.00 and his compensation rate was $489.36. For the second accident, it is believed that it is accepted that the Claimant had an average weekly wage of $835.60 and while on Page 32 of the transcript there appears to be an error as to the compensation rate, it is argued that the appropriate compensation rate would be $556.51. The Longshore Act provides that a disability total in character, but temporary in quality shall be paid to the employee during the continuance thereof. The Claimant credibly testified, on Pages 63 through 73 of the transcript, about the days that he was unable to work, and he identified which accident he attributed the loss of work time. Claimant testified that he was never reimbursed for these benefits and there is no reason that he, under the precepts of the Longshore Act, should be damaged economically and not be reimbursed when he is out of work for the purposes of obtaining medical care. The Employer/Carrier did not refute this issue and no other evidence was presented indicating that the Claimant was ever paid for those days that he had missed work. Quite the contrary, the Claimant credibly testified that he had missed

those days and was not paid benefits for that time of work. (CX 25)

On the other hand, Carrier #1 (Wausau Insurance) submits that Claimant has not established his entitlement to any temporary benefits, either total or partial, because the Employer has retained him in employment, has granted his several substantial job promotions and salary increases and because this closed record does not establish any loss of wage-earning capacity. (EX 1)

Carrier #2 (ACE USA) states as follows with reference to this issue (RX 10):

"The second issue in this case involves the Claimant's claim for payment of temporary partial disability benefits. The Claimant testified that he has missed time from work that was not compensated for by either carrier. It must be emphasized that the Claimant never offered any evidence that he missed time from work as a result of his second injury from the testimony of any physician. More importantly, the Claimant's uncontradicted testimony was that throughout the time he was employed at Lockheed Martin, he consistently received increases in his pay and at this time, he is making more money than he made at the time of his second accident. Since there is no evidence that the Claimant is at maximum medical improvement, and there is no evidence that the Claimant has been temporary (sic) and totally disabled, it is the assumption of the Employer/Carrier #2 that the Claimant is requesting temporary partial disability benefits. Temporary partial disability benefits is defined under the act by 33 USC Section 908(e). This statute defines temporary partial as a partial reduction in wage earning capacity for a temporary period in time entitling the employee to 55 2/3 % of the difference between his pre-injury earnings and his present earnings for a period not to exceed five years.

"It is submitted that there is absolutely no evidence that the Claimant has any reduction in his wage earning capacity as a result of his second accident. The Claimant testified that he has no restrictions as a result of his second accident, and there is no medical evidence offered to demonstrate that he has any type of loss of wage earning capacity in result of his second accident. Thus, if he is entitled to any temporary partial disability benefits, it is clear that these benefits are not the responsibility of the Employer/Carrier #2 for the 1996 injury to the Claimant's neck."

Initially, I note that I am in agreement that Claimant is not entitled, at this time, to an award of temporary partial disability benefits as even Claimant concedes, in effect, to no such wage loss by pointing out that his average weekly wage, as

of his 1992 accident, was $743.00 and, as of his 1996 accident, was $835.60. Claimant's testimony as to his alleged loss of overtime opportunities was quite vague, general and speculative and he has not offered any wage records to support his vague and generalized testimony on this issue.

However, he clearly is entitled to an award of temporary total disability benefits for those days on which he was unable to work because of the effects of his 1992 and 1996 accidents. Claimant credibly testified that he was unable to work on those days because of his accidents and that he was not paid for those absences, and neither Carrier has introduced any evidence contradicting that credible testimony.

I will now summarize Claimant's work absences, the date thereof, the amount of work missed and the accident responsible therefor (CX 23):

WORK ABSENCE	**HOURS MISSED**	**TOLLS**
04/29/97 (MRI of back)	4	
02/25/98 (MRI of back)	8	
01/14/98 (MRI of neck)	4	
11/02/99 (MRI of neck)	3	
04/02/99 (EMG of back)	4	
05/06/98 (EMG of back)	3.5	
04/28/99 (epidural to lumbar spine)	8	
05/13/99 (epidural to lumbar spine)	8	
05/27/99 (epidural to lumbar spine)	8	
06/01/99 (ER visit for back)	40 (or 8)	
10/22/99 (ER visit for neck)	8	
09/10/98 (ER visit for neck and back)	4	
03/10/98 (ER visit for neck)	8	
10/01/98 (ER visit for neck)	4	
03/07/96 (ER visit for neck)	6	
02/14/01 (visit to Dr. for back)	2	$3.75
11/21/00 (visit to Dr. for back)	2	$3.75
06/22/00 (visit to Dr. for back)	3	$3.75
03/29/00 (visit to Dr. for back)	2	$3.75
10/22/99 (visit to Dr. for neck)	6	$2.50
11/12/99 (visit to Dr. for back)	3	$3.75
04/15/99 (visit to Dr. for back)	2	$3.75
03/10/99 (visit to Dr. for neck)	3	$3.75
02/19/99 (visit to Dr. for back)	8	$3.75
01/06/99 (visit to Dr. for back)	1	$3.75
11/18/98 (visit to Dr. for back)	1	$3.75
11/03/98 (visit to Dr. for back)	1	$3.75
10/27/98 (visit to Dr. for back)	1	$3.75
09/29/98 (visit to Dr. for back)	8	$2.50
09/11/98 (visit to Dr. for back)	8	$2.50

08/19/98 (visit to Dr. for back)	8	$2.50	
07/02/98 (visit to Dr. for back)	8	$2.50	
06/02/98 (visit to Dr. for back)	0	$2.50	
04/23/98 (visit to Dr. for neck)	5	$3.75	
03/26/98 (visit to Dr. for back)	0	$3.75	
03/02/98 (visit to Dr. for back)	8		$2.50
02/23/98 (visit to Dr. for back)	5		$3.75
01/26/98 (visit to Dr. for back)	8		$2.50
12/23/97 (visit to Dr. Gutman)	6.5		
12/20/00 (cancelled depo.)	8		
01/26/01 (deposition)	8		
11/23/98 (attorney conference)	2		

R/T from work to doctor is 100 miles plus tolls of $3.75
R/T from home to doctor's office is 96 miles plus tolls of $2.50

DAYS OFF DUE TO INJURY

LUMBAR HOURS		**CERVICAL HOURS**	
01/10/01	2	08/17/98	5
01/09/01	6	08/18/98	8
06/22/99	3	02/23/98	8
06/03/99	8	07/31/98	5
06/02/99	8	10/19/98	8
06/01/99	8	10/25/98	1
06/22/99	1	10/27/01	1
08/25/99	2	10/22/99	8
02/11/98	8		
03/19/98	5		
10/20/99	4		
10/21/99	8		
08/17/98	5		
08/8/98	5		

As discussed above, Claimant has sustained two separate and discrete injuries while working for this Employer and, under the well-settled aggravation rule, ACE USA is responsible for the compensation benefits awarded herein to the Claimant as the effects of the March 7, 1996 injury have become superimposed upon the effects of his July 6, 1992 injury. ACE USA attempts to escape liability by pointing out that each injury affected different body parts. However, with reference to any compensation benefits that may be due Claimant, I cannot accept that thesis as apportionment of liability is not permitted under the Act and as the record before me does not establish, at this time, Claimant's entitlement to concurrent awards for his two injuries. In this regard, **see Foundation Constructors, Inc. v. Director, OWCP (Vanover)**, 950 F.2d 621, 25 BRBS 71 (CRT) (9th Cir. 1991); **Kelaita v. Director, OWCP**, 799 F.2d 1308, 13 BRBS

326 (9th Cir. 1986). **See also International Transportation Services (Buchanan) v. Kaiser Permanente Hospital**, 2001 WL 201498 (9th Cir. 2/26/01); **Port of Portland v. Director, OWCP (Ronne)**, 932 F.2d 836, 839-40 (9th Cir. 1991). C**ompare Hastings v. Earth Satellite Corp**, 8 BRBS 59, **aff'd**, 628 F.2d 85 (D.C. Cir.), **cert. denied**, 449 U.S. 905 (1980).

As Claimant injured his back on July 6, 1992 and as his injury on March 7, 1996 affected only his neck and shoulder areas, as a new and discrete injury, Wausau Insurance is responsible for all of the medical bills relating to the diagnosis, evaluation and treatment of Claimant's low back problems beginning on July 6, 1992 and continuing to the present time and into the future until further **ORDER** of this Court. Wausau is also responsible for the payment of benefits for temporary total disability for those days or hours Claimant was unable to work between July 6, 1992 and March 7, 1996.

Likewise, as Claimant sustained a new and discrete cervical injury on March 7, 1996 and as apportionment of liability between competing maritime Carriers is not permitted under the Longshore Act, unlike the Florida state statute, ACE USA is responsible for the payment of any compensation benefits payable to the Claimant, as well as the medical bills, related to such cervical injury between March 7, 1996 and continuing into the future. Appropriate orders relating to these benefits will be entered as part of this decision.

Section 14(e)

Claimant is not entitled to an award of additional compensation, pursuant to the provisions of Section 14(e), as the Respondents have accepted certain aspects of the claims, provided certain medical care and treatment and timely controverted his entitlement to additional benefits. **Ramos v. Universal Dredging Corporation**, 15 BRBS 140, 145 (1982); **Garner v. Olin Corp.**, 11 BRBS 502, 506 (1979).

Responsible Employer

The Employer and its Carriers, as further discussed below, are responsible for payment of benefits under the rule stated in **Travelers Insurance Co. v. Cardillo**, 225 F.2d 137 (2d Cir. 1955), **cert. denied sub nom. Ira S. Bushey & Sons, Inc. v. Cardillo**, 350 U.S. 913 (1955). Under the last employer rule of **Cardillo**, the employer during the last employment in which the claimant was exposed to injurious stimuli, prior to the date upon which the claimant became aware of the fact that he was

suffering from an occupational disease arising naturally out of his employment, should be liable for the full amount of the award. **Cardillo**, 225 F.2d at 145. **See Cordero v. Triple A. Machine Shop**, 580 F.2d 1331 (9th Cir. 1978), **cert. denied**, 440 U.S. 911 (1979); **General Dynamics Corporation v. Benefits Review Board**, 565 F.2d 208 (2d Cir. 1977). Claimant is not required to demonstrate that a distinct injury or aggravation resulted from this exposure. He need only demonstrate exposure to injurious stimuli. **Tisdale v. Owens Corning Fiber Glass Co.**, 13 BRBS 167 (1981), **aff'd mem. sub nom. Tisdale v. Director, OWCP, U.S. Department of Labor**, 698 F.2d 1233 (9th Cir. 1982), **cert. denied**, 462 U.S. 1106, 103 S.Ct. 2454 (1983); **Whitlock v. Lockheed Shipbuilding & Construction Co.**, 12 BRBS 91 (1980). For purposes of determining who is the responsible employer or carrier, the awareness component of the **Cardillo** test is identical to the awareness requirement of Section 12. **Larson v. Jones Oregon Stevedoring Co.**, 17 BRBS 205 (1985).

As noted above, Wausau Insurance Company is the Carrier on the risk under the Longshore Act for Claimant's 1992 injury and ACE USA is the Carrier on the risk for his 1996 injury.

Accordingly, in view of the foregoing, Wausau Insurance (Carrier #1) is responsible for the payment of any compensation benefits and medical expenses incurred between July 6, 1992 and March 7, 1996 relating to Claimant's July 6, 1992 accident. Moreover, ACE USA (Carrier #2) is responsible for the payment of any compensation benefits and medical expenses incurred, relating to Claimant's March 7, 1996 accident, beginning on this date and continuing until further **ORDER** of this Court.

Interest

Although not specifically authorized in the Act, it has been accepted practice that interest at the rate of six (6) percent per annum is assessed on all past due compensation payments. **Avallone v. Todd Shipyards Corp.**, 10 BRBS 724 (1978).

Ordinarily, interest may not be awarded on medical expenses unless the claimant had, in fact, paid those expenses out-of-pocket. **Pirozzi v. Todd Shipyards Corp.**, 21 BRBS 294 (1988) (Feirtag, J. dissenting in part). However, the Ninth Circuit has held that interest may be assessed against an employer on overdue medical expenses, **whether or not reimbursement is owed to the provider or to the employee. Hunt v. Director, OWCP**, 999 F.2d 419, 27 BRBS 84 (CRT) (9th Cir. 1993), **rev'g Bjazevich v. Marine Terminals Corp.**, 25 BRBS 240 (1991). **See also Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988), **aff'd mem. sub nom. Sea Tac Alaska Shipbuilding v. Director, OWCP**, 8 F.3d 29

(9th Cir. 1993) (Interest cannot be assessed on past-due medical benefits that claimant has not paid himself).

The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to ensure that the employee receives the full amount of compensation due. **Watkins v. Newport News Shipbuilding & Dry Dock Co.**, 8 BRBS 556 (1978), **aff'd in pertinent part** and **rev'd on other grounds sub nom. Newport News v. Director, OWCP**, 594 F.2d 986 (4th Cir. 1979); **Santos v. General Dynamics Corp.**, 22 BRBS 226 (1989); **Adams v. Newport News Shipbuilding**, 22 BRBS 78 (1989); **Smith v. Ingalls Shipbuilding**, 22 BRBS 26, 50 (1989); **Caudill v. Sea Tac Alaska Shipbuilding**, 22 BRBS 10 (1988); **Perry v. Carolina Shipping**, 20 BRBS 90 (1987); **Hoey v. General Dynamics Corp.**, 17 BRBS 229 (1985). The Board concluded that inflationary trends in our economy have rendered a fixed six percent rate no longer appropriate to further the purpose of making claimant whole, and held that ". . . the fixed six percent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. §1961 (1982). This rate is periodically changed to reflect the yield on United States Treasury Bills . . . ." **Grant v. Portland Stevedoring Company**, 16 BRBS 267, 270 (1984), **modified on reconsideration**, 17 BRBS 20 (1985). Section 2(m) of Pub. L. 97-258 provided that the above provision would become effective October 1, 1982. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director. The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

Medical Expenses

An Employer found liable for the payment of compensation is, pursuant to Section 7(a) of the Act, responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. **Perez v. Sea-Land Services, Inc.**, 8 BRBS 130 (1978). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. **Colburn v. General Dynamics Corp.**, 21 BRBS 219, 22 (1988); **Barbour v. Woodward & Lothrop, Inc.**, 16 BRBS 300 (1984). Entitlement to medical services is never time-barred where a disability is related to a compensable injury. **Addison v. Ryan-Walsh Stevedoring Company**, 22 BRBS 32, 36 (1989); **Mayfield v. Atlantic & Gulf Stevedores**, 16 BRBS 228 (1984); **Dean v. Marine Terminals Corp.**, 7 BRBS 234 (1977). Furthermore, an employee's right to select his own physician, pursuant to Section 7(b), is well settled. **Bulone v. Universal Terminal and Stevedore Corp.**, 8 BRBS 515 (1978). Claimant is also entitled to reimbursement for reasonable travel expenses in

seeking medical care and treatment for his work-related injury. **Tough v. General Dynamics Corporation**, 22 BRBS 356 (1989); **Gilliam v. The Western Union Telegraph Co.**, 8 BRBS 278 (1978).

In **Shahady v. Atlas Tile & Marble**, 13 BRBS 1007 (1981), **rev'd on other grounds**, 682 F.2d 968 (D.C. Cir. 1982), **cert. denied**, 459 U.S. 1146, 103 S.Ct. 786 (1983), the Benefits Review Board held that a claimant's entitlement to an initial free choice of a physician under Section 7(b) does not negate the requirement under Section 7(d) that claimant obtain employer's authorization prior to obtaining medical services. **Banks v. Bath Iron Works Corp.**, 22 BRBS 301, 307, 308 (1989); **Jackson v. Ingalls Shipbuilding Division, Litton Systems, Inc.**, 15 BRBS 299 (1983); **Beynum v. Washington Metropolitan Area Transit Authority**, 14 BRBS 956 (1982). However, where a claimant has been refused treatment by the employer, he need only establish that the treatment he subsequently procures on his own initiative was necessary in order to be entitled to such treatment at the employer's expense. **Atlantic & Gulf Stevedores, Inc. v. Neuman**, 440 F.2d 908 (5th Cir. 1971); **Matthews v. Jeffboat, Inc.**, 18 BRBS at 189 (1986).

An employer's physician's determination that Claimant is fully recovered is tantamount to a refusal to provide treatment. **Slattery Associates, Inc. v. Lloyd**, 725 F.2d 780 (D.C. Cir. 1984); **Walker v. AAF Exchange Service**, 5 BRBS 500 (1977). All necessary medical expenses subsequent to employer's refusal to authorize needed care, including surgical costs and the physician's fee, are recoverable. **Roger's Terminal and Shipping Corporation v. Director, OWCP**, 784 F.2d 687 (5th Cir. 1986); **Anderson v. Todd Shipyards Corp.**, 22 BRBS 20 (1989); **Ballesteros v. Willamette Western Corp.**, 20 BRBS 184 (1988).

Section 7(d) requires that an attending physician file the appropriate report within ten days of the examination. Unless such failure is excused by the fact-finder for good cause shown in accordance with Section 7(d), claimant may not recover medical costs incurred. **Betz v. Arthur Snowden Company**, 14 BRBS 805 (1981). **See also** 20 C.F.R. §702.422. However, the employer must demonstrate actual prejudice by late delivery of the physician's report. **Roger's Terminal**, **supra**.

It is well-settled that the Act does not require that an injury be disabling for a claimant to be entitled to medical expenses; it only requires that the injury be work related. **Romeike v. Kaiser Shipyards**, 22 BRBS 57 (1989); **Winston v. Ingalls Shipbuilding**, 16 BRBS 168 (1984); **Jackson v. Ingalls Shipbuilding**, 15 BRBS 299 (1983).

On the basis of the totality of the record, I find and conclude that Claimant has shown good cause, pursuant to Section 7(d). Claimant advised the Employer of his work-related injuries in a timely manner and requested appropriate medical care and treatment. However, while the Employer did accept the claims and did authorize certain medical care, additional medical care and treatment has been denied by both Carriers. Thus, any failure by Claimant to file timely the physicians' reports is excused for good cause as a futile act and in the interests of justice as the Carriers have consistently refused to authorize, approve and pay for additional medical care and treatment recommended by the Claimant's medical experts, as shall now be further discussed.

Claimant submits that he is in need of psychiatric care and that his recovery has been delayed by the Carriers' failure to authorize, approve and pay for reasonable and necessary medical care and treatment. I note that while the Claimant has had two accidents, his Employer has remained the same, to-wit: Lockheed Martin Missile and Space Company. Thus, while there was a change of insurance companies from Wausau Insurance Company to ACE USA, in fact the Employer remained the same. The Claimant timely filed claims wherein he alleges that he is suffering from depression as a result of his maritime accidents. As a result of filing the 1996 claim, the Carrier, ACE USA, arranged for the Claimant to be evaluated by Dr. Michael Gutman, a board certified psychiatrist in Orlando, Florida. The Claimant saw Dr. Gutman on May 10, 1999 and after performing an extensive evaluation, a review of Claimant's medical records and an MMPI, the doctor came to the conclusion of depressive disorder and, on Page 9 of Dr. Gutman's deposition, set forth his diagnosis and, on Page 10 of the doctor's deposition, he opined, within reasonable medical probability, that there was a causal relationship between both accidents the Claimant suffered on the job and his current depression. The doctor recommended treatment on Page 11 of his deposition and on Page 12 found that the Claimant had not reached a point of maximum medical improvement. The doctor further explained on Page 14 and 15 of his deposition that it is difficult to determine the exact relationship of Claimant's depression to each accident and he opined that the Claimant's first accident was the original source of the depression but that the second accident clearly was an **aggravating** factor.

Claimant submits that he is clearly in need of psychiatric care and that the need for the care is related to both accidents, both of which have been accepted as compensable. While Claimant's presentation of evidence as to the need for psychiatric care is overwhelming, he is also aided by the Section 20 Presumption that would further bolster the fact that the Claimant is in need of psychiatric care and it is related to

the industrial accidents. There has been no evidence presented in any way, manner or form refuting Dr. Gutman's testimony. Thus, the Claimant has fully established that he suffers a psychiatric impairment and disability as a result of his industrial accident and that he is in need of appropriate care, and he requests the authorization for Dr. Gutman. As already noted above, under **Foundation Constructors, Inc. v. Director, OWCP (Vanover)**, 25 BRBS 71 (CRT) (9th Cir. 1991), ACE USA is responsible for such psychiatric counseling as Claimant's depression is now superimposed on both of his maritime accidents.

With reference to the Claimant's first choice of physician for the 1996 accident, this accident was first initially controverted and the Claimant had to apply to the Office Administrative Law Judges for relief for a finding that the accident was compensable. Although this case did not proceed to a hearing before an Administrative Law Judge, the Employer/Carrier did agree to accept the accident as compensable and the case was remanded to the District Director for follow-up. At the time of the accepting of this claim as being compensable, the Claimant was seeing a Dr. Gerber, who was at the time treating the Claimant for his first accident in 1992. The Claimant immediately made a request for authorization for a physiatrist of his choice with either Dr. Olsson or Dr. Shea. Dr. Gerber also is a physiatrist. The Claimant submits that, in accordance with Section 7 and the pertinent regulations, he is entitled to an unrestricted first choice of physician. Even in the first accident, the Claimant did not request authorization and treatment with Dr. Gerber and the Claimant relies on pertinent precedents that the Claimant is allowed to select a first choice of physician in each specialty, especially as the Claimant has never been given any choice of physician regarding his 1996 accident.

In the deposition taken of Brenda Meadows, the adjuster for ACE USA on January 25, 2001, the adjuster testified on Page 18 of her deposition that she can only assume that Dr. Gerber was the Claimant's first choice of physician but she has no evidence whatsoever indicating that the Claimant had ever had a first choice of physician. Again, the adjuster testified, on Page 22 of her deposition, that her company was aware of the fact that there had been a request for Dr. Shea and Dr. Olsson but that the authorization had not been provided. Even on Page 23 of the adjuster's deposition, the question was raised whether they would now authorize Dr. Olsson or Dr. Shea and the adjuster

simply responded that she would investigate and get back to the Claimant.[4]

Claimant submits, and the record establishes, that clearly the Claimant did not exercise his first choice of physician after ACE USA accepted the compensability of the 1996 injury, that ACE USA did not provide authorization for a first choice of physician even though from the start Dr. Shea and/or Dr. Olsson had been requested. The Carrier has failed to do so at its peril.

The Claimant at this time is requesting authorization first with Dr. Shea or, the alternative, Dr. Olsson, and this will be his first choice of physician in that specialty. There is no evidence that he ever exercised his first choice of physician for any medical specialty regarding the 1996 accident and that authorization should be provided at this time.

Claimant also requests that Wausau Insurance authorize and approve a physiatrist of his choice for the 1992 accident. The Claimant, however, does concede that he had agreed to a first choice of physician, a neurologist, Dr. Newman, after the informal conference and while Dr. Broom, the orthopedist who operated on the Claimant, was not selected as a first choice of physician, obviously it was agreed that Dr. Broom would be the treating orthopedic surgeon; it was also agreed that Dr. Broom would provide the surgery and for this reason Dr. Broom must be considered as Claimant's choice of physician as an orthopedic surgeon. 20 C.F.R. §702.406 provides that the Claimant shall be allowed a first choice of physician in each specialty. After Dr. Broom operated on the Claimant and was of the opinion that he could do no further surgery, the Claimant was referred to Dr. Wasserman, a physiatrist. When Dr. Wasserman left the area, the Claimant was referred to Dr. Gerber. The Claimant sent demands to the Wausau requesting authorization with either Dr. Shea or Dr. Olsson, insisting that the Claimant had never exercised a first choice of treating physician regarding a physiatrist, a well-recognized medical specialty. Wausau has denied this request on the basis that they had provided authorization for a first choice of physician with Dr. Newman and Dr. Broom. It is the Claimant's contention that he should have a first choice of physician regarding a physiatrist and that it would only make sense that the same physiatrist treat the Claimant for both the first and second accidents. I agree as this provides an economic benefit in that the doctor can see the Claimant for both medical conditions at the same visit. Secondly, there will

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[4]Counsel for ACE USA has not advised this Court as to any action it intends to take herein voluntarily. Thus, this decision now issues.

not be a dispute over different doctors providing treatment for one of the other injuries, and logic would require that it would make sense for the Claimant who has already undergone surgery to be treated by one physician for both accidents, especially in view of the fact that the Claimant is still working for the same Employer but is clearly suffering from medical limitations.

What is apparent here is that the Claimant has not exercised his initial free choice of a physiatrist, that the Claimant has requested authorization for Dr. Shea or Dr. Olsson. In the second accident, the Claimant would be satisfied with Dr. Shea, first, treating the Claimant for both accidents or, in the alternative, Dr. Olsson who then could treat the Claimant for both accidents.

On the other hand, Wausau Insurance (Carrier #1) submits that the responsibility of providing psychiatric treatment is with ACE USA based upon the well-settled "aggravation (two injury) rule" as articulated in **Foundation Constructors, Inc. v. Director, OWCP (Vanover)**, 950 F.2d 621, 25 BRBS 71 (9th Cir. 1991), as well as in **Kelaita v. Director, OWCP**, 799 F.2d 1308, 13 BRBS 326 (9th Cir. 1986).

In **Foundation**, the Board explained that the aggravation rule is a branch of the last employer rule. It explained that the last employer rule (which holds the claimant's last employer liable for all of the compensation due claimant even though prior employers may have contributed to the disability), serves to avoid the difficulties and delays connected with trying to apportion liability among several employers. **Id.** at 74.[5]

The Board further opined that the last employer rule applies to occupational disease cases, whereas the aggravation rule applies to cases involving two injuries. **Foundation** at 74. The Board further enunciated the aggravation rule as follows:

> "If the disability resulted form the natural progression of a prior injury and would have occurred notwithstanding the subsequent injury, then the prior injury is compensable and accordingly, the prior employer is responsible. **If, on the other hand, the subsequent injury aggravated, accelerated or combined with claimant's prior injury, thus resulting in claimant's disability, and the subsequent injury is**

[5]Such difficulty can be seen herein as to the length of time this matter has been pending, a matter which clearly is a "fight" between the Carriers, each of whom is trying to impose liability on the other.

the compensable injury, then the subsequent employer is responsible." **Id.** at 75. (Emphasis added)

In doing so, the Board, as it had done in the past, emphasized that "the aggravation (two-injury) rule applies even though the worker did not incur the greater part of his injury with that particular employer." **Port of Portland v. Director, OWCP (Ronne)**, 932 F.2d 836, 839-40 (9th Cir. 1991).

Moreover, the law is clear that medical care is the obligation of the employer that aggravates the injury. **Abbott v. Dillingham Marine & Manufacturing Company**, 14 BRBS 453 (1981); **Fargo v. Campbell Industries, Inc.**, 9 BRBS 766 (1978); **Salusky v. Army Air Force Exchange**, 3 BRBS 22 (1975).

In this case, the totality of this closed record leads to the conclusion that the 1996 accident aggravated Claimant's depression. Dr. E. Michael Gutman, a Board-Certified psychiatrist, performed an independent medical examination of Claimant on May 10, 1999. He testified that while he felt Claimant had depression relating to the 1992 accident, the 1996 accident was an aggravating factor. (Deposition of Dr. Gutman at p. 15-16). He testified:

Q: Would you feel comfortable in saying that under any circumstance the second accident was an aggravating factor?

A: Yes.

Q: Would that be within a reasonable degree of medical probability, Doctor?

A: Yes.

Moreover, Claimant testified at the hearing:

Q: All right. Well, let me ask you a question. Do you feel the 1996 accident in any way affected your depression?

A: Yes.

Q: And how did it affect it?

A: It got worse. I had two injuries to worry about.

(Transcript at p. 59)

ACE's position that Claimant would have needed a psychiatrist notwithstanding the 1996 accident misses the point,

calls for speculation and is without merit. In response to a question regarding causal relationship of the depression as between the 1992 accident and the 1996 accident, Dr. Gutman testified:

> A: It is possible, however, it [the depression] may not even have developed, depressive symptoms may have had the subclinical features of the drag on him [referring to the 1992 accident] and then the other - **it was subclinical [referring to the 1992 accident] and then it became more clinical as an additional burden on him [referring to the 1996 accident]**. (Emphasis added)

This testimony is further bolstered by the fact that, as testified by Dr. Gutman, the first mention of depression was in a record of Dr. Wasserman dated April 23, 1998; the April 23, 1998 record was the first indication of clinical depression; Claimant told Dr. Gutman that he had never taken anti-depressants or anti-anxiety medication until prescribed by Dr. Wasserman in 1998; and the first referral for a psychiatric evaluation was by Dr. Gerber on March 10, 1999. (Dr. Gutman's deposition at pp. 28-31). Significantly, all of these events occurred after the 1996 accident, supporting the opinion that the 1996 accident aggravated the depression and made it into a clinical depression requiring treatment.

Therefore, because the undisputed testimony is that the 1996 accident aggravated Claimant's depression, the responsibility to provide treatment is with ACE, according to Wausau.

On the other hand, counsel for ACE USA reads the **Vanover** and **Kelaita** cases differently and arrives at a different conclusion. As counsel notes, both cases arise out of the Ninth Circuit Court and deal with similar factual patters. In both cases, the Claimant had two injuries to the same body part. In **Kelaita**, both injuries were due to cumulative trauma and both involved the same shoulder. Basically, as a result of cumulated trauma at work, the claimant in **Kelaita** injured his shoulder and then later while working for a different employer, aggravated the same condition through cumulative trauma.

In **Foundation Constructors**, that claimant worked for two separate employers and as a result of cumulative trauma, sustained an injury to his back. As in **Kelaita**, in **Foundation Constructors**, the injury was to the same body part. In both **Kelaita** and **Foundation Constructors**, the cause of the injury was repetitive trauma at work. Thus, the last injurious exposure rule was utilized to determine which employer would be responsible.

The use of the last injurious exposure rule with respect to injuries caused by repetitive trauma is a useful method for determining the responsible employer where it is impossible to determine which accident may have caused the current disability. Further, in each instance, the injury and method of accident are identical and therefore, the last injurious exposure rule permits the entire burden for treating the injured to be placed on the employer who had coverage during the last injurious exposure.

However, this is not the factual situation in the instant case. In this case, there are two distinct injuries as a result of two accidents involving different body parts. The Claimant's first accident in 1992 resulted in an injury to his low back. The injury in 1996 allegedly resulted in an injury to the Claimant's neck.

Although there is no established medical diagnosis for the injury allegedly sustained in 1996, it is clear that the neck injury in 1996 did not aggravate the low back condition occurring in 1992. Neither injury is related to the other injury, according to the thesis of ACE USA.

Dr. Gutman's uncontroverted testimony is that the 1992 accident caused the Claimant's psychiatric condition. Thus, the psychiatric condition is a sequella of the 1992 accident. The 1996 accident did not cause the psychiatric condition. Nor is there any evidence that has been submitted showing how the alleged second injury somehow aggravated and accelerated the Claimant's alleged psychiatric condition, according to ACE USA.

It is submitted that the doctrine set forth in **Kelaita** and **Foundations Constructors** can only be utilized in occupational disease cases or in repetitive trauma cases. In these type of cases, the two injuries are identical and it makes sense to have the second employer responsible for treatment of the entire condition since there is a clear cut aggravation of the same injury as a result of the second accident. However, in this case, there was not an aggravation of the injury from the first accident in the second accident.

In no way, whatsoever, did the Claimant's second accident in any way aggravate his low back condition. There is absolutely no relationship between the Claimant's low back injury and a cervical injury. Thus, the two injury rule discussed in **Foundation Constructors** does not apply to the instant fact situation. This is not a repetitive trauma case, nor is it an occupational disease case, according to ACE USA.

If the **Foundation Constructor** and **Kelaita** cases were to apply to the instant fact situation, then a second employer

would be held responsible for unrelated injuries arising from earlier accidents. The Claimant's psychiatric condition in this case is a mere sequella of his original accident in 1992, which is an injury to the Claimant's low back. There is no evidence that the 1996 cervical injury in any way caused the Claimant's psychiatric condition.

ACE USA concedes that if this were a repetitive trauma situation, then the **Kelaita** and **Foundation Constructor** doctrines would apply. However, it is submitted that the doctrine set forth from those two cases is limited to repetitive trauma conditions involving the same body part or injury and does not apply to separate and distinct accidents involving separate and distinct injuries to different parts of the Claimant's body. It is clear from the evidence that the Claimant's psychiatric condition relates to his first accident and he would have the psychiatric condition notwithstanding the second accident. Since the second accident did not in any way aggravate the underlying physical injury from the 1992 accident which produced the psychiatric condition, then the second accident does not constitute an aggravation of the first accident within the meaning of either **Kelaita** or **Foundation Constructors**.

ACE USA also submits, interestingly, that neither accident in this case caused the Claimant's psychiatric condition. The two distinct accidents in this case caused a physical injury in each instance. Traditionally, there have been two types of psychiatric injuries that have been found to be compensable under the Longshore & Harbor Workers' Compensation Act. The first is the onset of a psychiatric condition related to a physical trauma such as a back injury and the second involves a work related stress that causes a psychiatric injury. The latter situation does not exist in the instant case.

This is a classic case of where a psychiatric condition is caused by physical trauma. In this case, the physical trauma was the Claimant's low back injury of 1992. The 1992 accident did not directly cause the psychiatric condition. The 1992 accident did cause the low back condition where it ultimately led to surgery and it has been the Claimant's primary medical problem. Thus, the accident did not directly produce the psychiatric condition, but it appeared later as a sequella of the original low back injury.

ACE USA also posits that the 1996 accident did not aggravate the physical injury from the 1992 accident which is the cause of the Claimant's psychiatric condition. Therefore, this case does not fall within the perimeters of the two injury rule set forth in **Kelaita** and **Foundation Constructors** since there is absolutely no relationship between the injuries that were caused by the two accidents of 1992 and 1996. Since the underlying injuries in

this case are not related and could not possibly be related to each other, then the other medical conditions that are produced by the underlying physical injury can not be related to a subsequent unrelated accident and injury.

I disagree completely with the position of ACE USA because, as summarized above, Dr. Gutman has expressed the opinion that the 1996 injury clearly **aggravated** Claimant's depressive disorder, and that opinion is uncontradicted herein. To accept the thesis of ACE USA would simply prolong the litigation in each claim, as clearly has happened here, and especially as the Claimant has continued to work for the same Employer. The two-injury or aggravation rule is a rule of utmost pragmatism and is designed to expedite the processing of workers' compensation claims. This did not occur herein, because this proceeding is really a dispute between two Carriers.

With reference to Claimant's need for treatment by a physiatrist, **i.e.**, a medical physician who specializes in pain management, as noted above, Claimant submits as follows:

The Claimant's 1996 accident was first initially controverted and the Claimant had to apply to the Office of Administrative Law Judges for relief for a finding that the accident was compensable. Although this case did not go for a hearing before the Administrative Law Judge, ACE USA did agree to find the accident as compensable and the case was remanded to the District Director. At the time of the accepting of this claim as being compensable, the Claimant was seeing a Dr. Gerber, who was at the time also treating the Claimant for his first accident in 1992. The Claimant immediately made a request for authorization for a physiatrist of his choice with either Dr. Olsson or Dr. Shea. Dr. Gerber also is a physiatrist. The Claimant, in accordance with pertinent legal principles, is entitled to an unrestricted first choice of physician. Even in the first accident, the Claimant did not request authorization and treatment with Dr. Gerber and the Claimant relies on the Code of Federal Regulations that he is allowed to select a first choice of physician in each specialty, Claimant pointing out that because of the inaction of both Carriers he has not been given any choice of physician regarding his 1996 accident. As noted, Ms. Harry was unable to document Dr. Gerber as Claimant's initial free choice of physician.

As also noted above, in the deposition taken on January 25, 2001 of Brenda Meadows, the adjuster for ACE USA, the adjuster testified on Page 18 of her deposition that she can only assume that Dr. Gerber was the Claimant's first choice of physician and indicates that she has no evidence whatsoever indicating that the Claimant had ever had a first choice of physician. Again, the adjuster testified on Page 22 of her deposition that her

company was aware of the fact that there had been a request for Dr. Shea and Dr. Olsson and the authorization had not been provided. Even on Page 23 of the adjuster's deposition the question was raised whether they would now authorize Dr. Olsson or Dr. Shea and the adjuster responded that she would investigate. No answer yet has been provided.

As the Claimant was never given his first choice of physician from the start of ACE USA accepting the compensability of the 1996 case and as ACE USA has not provided the authorization for a first choice of physician, even though from the start Dr. Shea and Dr. Olsson had been requested, Claimant is entitled to that choice, and I so find and conclude.

On the other hand, Wausau Insurance (Carrier #1) submits that Claimant is not entitled to another free choice of a physiatrist as he has already exercised his initial choice of physician based upon its reading of the evidence.

Claimant formally selected Dr. Richard Newman (neurologist) as his initial free choice of physician, as evidenced by a Memorandum of Informal Conference. (ECX 9) The law does not give any further right to choose under the facts of this case, according to Wausau.

33 USC 907(a) and 20 CFR 702.43 give claimant the right to choose an attending physician and 20 CFR 702.406(a) prescribes when and how a claimant may change physicians and when consent by the employer/carrier is required. (Emphasis added). It states:

> "Whenever the employee has made his initial, free choice of an attending physician, he may not thereafter change physicians without the prior written consent of the employer (or carrier) or the district director. Such consent [to change] shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for, and appropriate to, the proper care and treatment of the compensable injury or disease. In all other cases, consent may be given upon a showing of good cause for a change."

A literal reading of Section 702.406(a) states only that the employer/carrier must give consent to a change in physicians if the initial choice was not in an appropriate specialty; it does not expressly state that the claimant has the right to choose the physician in that circumstance, according to Wausau.

Even if Section 702.406(a) is interpreted to mean a claimant does have the right to choose a specialist if the initial choice

was not in an appropriate specialty, it does not apply to this case because claimant's initial choice was in an appropriate and proper specialty, **i.e.**, a neurologist. To the contrary, if claimant had, for example, chosen a general practitioner as his attending physician, then he would arguably be entitled to select a specialist such as an orthopedist, neurologist, chiropractor or pain management specialist.

Wausau further submits that there is ample evidence to infer that Claimant did in fact choose his current physiatrist, Dr. Gerber. Dr. Gerber is a partner of Dr. Broom. Dr. Broom is the orthopedic surgeon who performed the surgery on Claimant. It is clear from the correspondence between Mr. Schwartz and Mr. Sharp that Claimant chose Dr. Broom. (**See** ECX 10, 12) Further, it is noted in Dr. Broom's June 18, 1997 record (ECX 5) that "[t]he patient states that if he were to have surgery, he would prefer to have it done through this office." After being placed at maximum medical improvement on November 21, 1997 by Dr. Broom, Claimant started seeing Dr. Wasserman, who was then in Dr. Broom's practice, for continued pain management. When Dr. Wasserman left the practice, Claimant started seeing Dr. Gerber. He has been seeing Dr. Gerber since March 10, 1999, according to Dr. Gerber's records. (ECX 9)

Finally, there is no good cause for a change in physicians at this time. While Claimant stated at the hearing he would like a different doctor for his "neck injuries," no reason was given nor was the statement made in reference to the low back. (TR at 57) Claimant, in his deposition dated January 26, 2001 at page 15, admitted that he liked Dr. Gerber but felt he needed a neurosurgeon. (The claim for a neurosurgeon, however, was apparently dropped as it was not raised at the hearing.)

Moreover, a number of physicians have been authorized in this case prior to Drs. Broom, Wasserman and Gerber. At the outset, Glen P. Musselman (orthopedist) was authorized. (Claimant's deposition taken June 2, 1996 at pp. 21-22.) Claimant then told his safety engineer that he did not want to be seen by Dr. Musselman, but wanted to be seen by a chiropractor. (**Id.** at 36) He testified that his employer told him that he had his choice of doctors and it was his option if he wanted to see a chiropractor. (**Id.** at 37) As a result, he started seeing Gary R. Ostoski, D.C. (**Id.**) Dr. Ostoski then referred him to Joseph E. Rojas, M.D. (orthopedic surgeon) who provided injections. (**Id.** at 43) He then had a second opinion with a partner of Dr. Rojas, Todd B. Jaffe, M.D. (**Id.** at 49) He also saw Richard Newman, M.D. (neurologist). (**Id.** at 53) It would therefore seem from the standpoint of reason that Wausau's obligation with respect to providing medical treatment has been satisfied in this claim, according to its counsel.

In sum, Claimant is not entitled to another "initial free choice" as a matter of law. He exercised his initial free choice in an appropriate specialty when he chose Dr. Newman. There is also evidence from which this Administrative Law Judge may infer that Claimant chose Dr. Broom and Dr. Gerber. Moreover, there is not good cause for a change in physicians from Dr. Gerber at this time. Claimant has been seen by a myriad of physicians during the course of these claims. He has been treating with Dr. Broom's group since 1997 and with Dr. Gerber specifically since early 1999. No testimony was offered to substantiate a change, according to Wausau.

Likewise, counsel for ACE USA also submits that with reference to the issue as to whether or not Claimant has exercised his initial choice of physicians, Claimant was already being treated by Dr. Gerber at the time that ACE USA became aware of the occurrence of Claimant's March 7, 1996 work-related injury while it was the Carrier on the risk. As Dr. Gerber was not selected either by the Employer or ACE USA, counsel for Carrier #2 posits that Dr. Gerber was selected by the Claimant as his first choice of physician. Thus, he is not entitled to another choice of physician as he has already exercised that right.

I disagree completely with the thesis of ACE USA on this issue as that thesis assumes as its major premise that a new injury did not occur on March 7, 1996, that if a new injury did occur at that time, its effects were limited only to Claimant's cervical area and did not aggravate, accelerate or exacerbate Claimant's psychiatric problems. I disagree because I have already found and concluded above that Claimant sustained a new and discrete injury on March 7, 1996, that that injury affected not only Claimant's cervical, left arm and shoulder areas but also became superimposed upon his depression, and that both Carriers are responsible for their portion of the medical benefits awarded herein, as further discussed below.

As found above, Claimant's psychiatric condition on and after March 7, 1996 is the sole responsibility of ACE USA.

Accordingly Claimant is entitled to the following specific relief: Wausau Insurance Company is responsible for the reasonable and necessary medical care and treatment relating to Claimant's July 6, 1992 back injury, including authorizing and paying for (1) a neurosurgeon selected by Claimant to evaluate the problem with the nerves in his legs; (2) a physiatrist, Dr. Olsson or Dr. Shea, to help Claimant deal with the chronic lumbar pain that he daily experiences; (3) the medical bills relating to Claimant's psychological problems between July 6, 1992 and March 6, 1996 and the jacuzzi medically prescribed for Claimant as its use has had a beneficial effect; (4) the

physical therapy sessions recommended by Dr. Joseph E. Rojas (as Wausau would only approve two sessions per week); and (5) the medical expenses incurred by Claimant in seeking medical care and treatment as reflected in CX 21.

ACE USA is responsible for the reasonable and necessary medical care and treatment relating to Claimant's March 7, 1996 cervical, left arm and shoulder problems, including authorizing and paying for (1) an orthopedic physician or neurosurgeon to deal with those problems; (2) a physiatrist selected by Claimant to help him deal with his chronic pain symptoms; (3) a psychiatrist or psychologist selected by Claimant to counsel him with reference to his emotional problems and payment of those medical bills commencing on March 7, 1996; and (4) the medical expenses incurred in seeking medical care, all of which expenses are subject to the provisions of Section 7 of the Act.

As noted above, Claimant seeks reimbursement for those hours and/or days he was not able to work because he had to seek medical treatment. These days and hours have been specifically detailed above and are listed in CX 21.

However, Claimant is not entitled to such reimbursement because the Board has held that Section 7(a) does not entitle a claimant to reimbursement of annual leave taken while obtaining medical treatment, although the employer is liable for such treatment. Moreover, the claimant is not entitled, pursuant to Section 7(a), to reimbursement of parking expenses, annual leave and other out-of-pocket expenses incurred while attending his hearing herein. However, parking expenses, mileage and highway and bridge toll expenses, incurred while obtaining medical treatment, **for which an employer is liable**, are chargeable to the employer as transportation costs pursuant to Section 7(a). In this regard, **see Castagna v. Sears, Roebuck & Company**, 4 BRB 559 (1976).

I note that Claimant has not cited any case precedent permitting such award to him and our research has failed to identify any case in his support. Thus, I must deny that claim by the Claimant for such reimbursement. Perhaps it may be time for the Board to revisit **Castagna** and determine if that is still good law.

As also noted above, Claimant does not, at this time, seek benefits for any partial disability, whether permanent or temporary, because he is still working, has received wage increases and his earnings do not establish, at this time, any loss of wage-earning capacity.

It is now well-settled, as a result of the 1984 Amendments to the Longshore Act by Section 6(a), that compensation benefits

cannot be paid to an injured employee unless the employee is out of work for fourteen (14) consecutive days or later as a result of a work-related injury and once that requirement is met, compensation benefits are payable to the employee from the first day of disability. Section 6(a) also provides that no compensation will be allowed for the first three (3) days of disability except for medical services and supplies under Section 7.

As Claimant in the case at bar has not met that requirement, he is not entitled to reimbursement of the time he has lost to seek medical treatment pursuant to Section 8 of the Act.

While Claimant alleges that he has lost approximately $15,000.00 in lost overtime opportunities between January 27, 1995 and September 10, 1995, his wage records do not establish such loss as his wages have progressively increased since his July 6, 1992 injury while working for the Employer. I note that he has been paid compensation benefits by Wausau for his absences due to that 1992 injury and that he seeks no additional benefits for those absences, and I so find and conclude.

With reference to Claimant’s 1996 injury, he has missed some work time to keep his medical appointments and that issue has already been resolved above.

Attorney's Fee

Claimant's attorney, having successfully prosecuted this claim, is entitled to a fee to be assessed against the Employer and its Carriers (Respondents). Claimant's attorney has not submitted his fee application. Within thirty (30) days of the receipt of this Decision and Order, he shall submit a fully supported and fully itemized fee application, sending a copy thereof to each Respondent’s counsel who shall then have fourteen (14) days to comment thereon. A certificate of service shall be affixed to the fee petition and the postmark shall determine the timeliness of any filing. This Court will consider only those legal services rendered and costs incurred after the date of the informal conference, or if none took place, after referral of this claim to the Office of Administrative Law Judges. Services performed prior to that date should be submitted to the District Director for his consideration. As both Carriers have been found responsible for certain benefits herein, the fee petition should be apportioned, as accurately as possible, with reference to the services rendered and costs incurred with reference to the 1992 and 1996 injuries.

ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I issue the following compensation order. The specific dollar computations of the compensation award shall be administratively performed by the District Director.

It is therefore **ORDERED** that:

1. Wausau Insurance Company shall pay for the reasonable and necessary medical expenses relating to the diagnosis, evaluation and treatment of Claimant's lumbar problems, as a result of his July 6, 1992 injury, beginning on July 6, 1992 and continuing to the present time and into the future until further **ORDER** of this Court, pursuant to Section 7(a) of the Act. Claimant shall select the specialist to provide such treatment.

2. ACE USA shall pay for the reasonable and necessary medical expenses relating to the diagnosis, evaluation and treatment of Claimant's cervical, shoulder and left arm problems, as a result of his March 7, 1996 injury, beginning on March 7, 1996 and continuing to the present time and into the future until further **ORDER** of this Court, pursuant to Section 7(a) of the Act. Claimant shall select the specialist to provide such treatment.

3. Wausau Insurance Company shall also be responsible for the medical expenses in the diagnosis, evaluation, treatment and counseling of Claimant's psychological problems between July 6, 1992 and March 6, 1996, and, as of March 7, 1996, ACE USA shall be responsible for such medical expenses, pursuant to Section 7(a), and such liability shall continue until further **ORDER** of this Court. Claimant shall select the specialist to provide such services.

4. Due to the complexities herein, Claimant is directed to submit the medical benefits awarded in provisions 6, 7 and 8 directly to the District Director to facilitate the orderly administration of this **ORDER**.

5. Claimant's attorney shall file, within thirty (30) days of receipt of this Decision and Order, a fully supported and fully itemized fee petition, sending a copy thereof to each Respondent’s counsel who shall then have fourteen (14) days to comment thereon. This Court has jurisdiction over those services rendered and costs incurred after the informal conference or after the referral of this claim to the Office of Administrative Law Judges, whichever event occurred first. As noted, the fee petition shall be apportioned, as accurately as possible, between the two injuries before me.

A
DAVID W. DI NARDI
District Chief Judge

Boston, Massachusetts
DWD:jl